Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

DOMINIC BARAGONA, *et al.*,

Petitioners,

v.

KUWAIT GULF LINK TRANSPORT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does allowing a defendant, who had notice and an opportunity to contest personal jurisdiction, to subsequently challenge personal jurisdiction and vacate a default judgment under Fed. R. Civ. P. 60(b)(4) perpetuate the disarray among the lower courts regarding their unjustifiably inconsistent treatment of judgments pursuant to Fed. R. Civ. P. 60(b)(4), resulting from a misinterpretation of this Court's dicta, in contravention of important federal judicial policies?

2. Does Fed. R. Civ. P. 60(b)(4) create an exception to the waiver provisions of Fed. R. Civ. P. 12(h) for a defaulted defendant?

PARTIES TO THE PROCEEDING

Petitioners Dominic and Vilma Baragona, citizens of the United States and Florida, lost their son Lieutenant-Colonel Dominic Baragona as a result of the negligence of the driver of a tractor trailer truck owned by Kuwaiti Gulf Link Transport Company on May 19, 2003. Petitioners bring this action in their individual capacity as parents, and by Dominic Baragona as administrator of the estate.

Respondent Kuwaiti Gulf Link Transport Company is a Kuwaiti corporation, organized under the laws of Kuwait, which held contracts with the U.S. government at the time of the accident.

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Sup. Ct. R. 10(c) 8

Petitioner Dominic Baragona respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on January 21, 2010.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Eleventh Circuit (Edmondson, Birch, Kravitch, opinion per curiam) is reported at 594 F.3d 852, and is reprinted in the Appendix hereto at 1a.

The Memorandum Opinion of the United States District Court for the Northern District of Georgia (William S. Duffey, Jr.) is unpublished, and is reprinted in the Appendix hereto at 8a.

The Order of the United States District Court for the Northern District of Georgia (William S. Duffey, Jr.) finding personal jurisdiction over the defendant is unpublished, and is reprinted in the Appendix hereto at 50a.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2010. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule Civil Procedure 12(h):

. . .

(h) Waiving and Preserving Certain Defenses.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

Federal Rule Civil Procedure 60(b)(4):

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

. . .

(4) the judgment is void;

. . .

STATEMENT OF THE CASE

On May 19, 2003 Lieutenant-Colonel Dominic Baragona, Petitioner Dominic and Vilma Baragonas' ("Baragona" or "Petitioner") son, died in a tragic and senseless traffic accident in Iraq near the Kuwaiti border. Kuwait Gulf Link Transport Company ("KGL"), a U.S. government contractor, employed the driver whose negligence was found by the U.S. Army to have killed Lieutenant-Colonel Dominic Baragona. Petitioner filed suit in the United States District Court for the Northern District of Georgia and invoked the jurisdiction of the District Court under 28 U.S.C. § 1332 because of diversity of citizenship, Petitioner being a resident of Florida and the Respondent being a resident of Kuwait.

Petitioner served the Complaint on KGL twice: directly by the Clerk of the Court by international courier on March 20, 2006 with a required-return-receipt, a protocol directed by the Court, R-4, and secondly through the Kuwaiti Ministry of Justice under the under the Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters on July 11, 2006. R-17. According to a July 11, 2006 letter, KGL subsequently retained Crowell & Moring, a Washington, D.C. government contracts law firm, to represent it in its proceedings with the U.S. Department of the Army Legal Services Agency, Procurement Fraud Branch, which also arose out of Colonel Baragona's death. R-105. Subsequently, upon Petitioner' motions for default and by order of the District Court, the Clerk of Court entered two defaults against KGL for its failure to appear or otherwise

answer after service of the Complaint on August 21, 2006 and January 10, 2007. The District Court then scheduled and conducted a hearing in this case on January 30, 2007.

At the hearing, the District Court directed Petitioner to prepare a memorandum of law on issues related to personal jurisdiction. The District Court ordered Petitioner to serve this document on KGL in Kuwait and its counsel in the United States. R-20. Petitioner prepared the memorandum, served it on KGL and its counsel in the United States as requested by the Court. KGL failed to respond or appear to contest the issue of personal jurisdiction, and on April 9, 2007 the District Court ruled "Plaintiffs submitted an affidavit setting forth a number of contacts between Defendants and the state of Georgia . . . . Plaintiffs have shown a prima facie case that the Court has personal jurisdiction over the Defendants in this case." R-24 at p.2. In this Order the District Court noted the "considerable effort to serve Kuwait Gulf Link Transport Company, a Kuwaiti entity notice of this lawsuit" expended by Plaintiffs. R-24 at p.2 n.1. The District Court also noted that KGL was represented in a collateral proceeding, that Petitioner had served KGL with their memorandum regarding jurisdiction on KGL's counsel and KGL itself and that KGL had not answered the memorandum of law regarding personal jurisdiction. R-24 at p.2 n.1.

The District Court then held a hearing on damages on April 25, 2007. Several months later, the District Court awarded $4,907,048 to Petitioner in compensatory damages against KGL on November 5, 2007. R-37. As a result of that final judgment, the Department of Army

Procurement Fraud Branch sent a letter to the Director of Legal Affairs for KGL requesting "information regarding the manner in which it intends to satisfy the judgment against it."

After monitoring the case through counsel in the United States for at least a year and a half and ignoring the notice required to be served by the Court of the adjudication of the issue of personal jurisdiction, KGL finally entered the case by filing a Motion to Vacate the Final Judgment, on February 15, 2008 over four months after the entry of final judgment, by arguing that KGL has insufficient contacts with the forum to allow for the assertion of personal jurisdiction over KGL. Petitioner responded by filing a Motion to Require a Bond, an opposition to KGL's motion to vacate and moved for jurisdictional discovery on March 21 2008. R-49, 51. On June 18, 2008 the District Court deferred ruling on the motion to vacate and granted Petitioner's request for a Bond finding that "KGL's conduct in this matter has been somewhat troubling, evasive and disruptive to the Court's consideration of a significant jurisdictional issue." R-57 at p. 20.

On December 5, 2008, the Court held an evidentiary hearing on the subject of personal jurisdiction. The Court required the parties to each simultaneously file a 20 page brief on KGL's personal jurisdiction contacts with the forum by January 2, 2008. The Court thereafter vacated the default judgment against KGL as a result of its finding that KGL did not waive its right to raise the defense of personal jurisdiction in its Fed. R. Civ. P. 60(b)(4) motion and that personal jurisdiction could not be asserted over KGL by the District Court. R-114 at p.33, 43.

Petitioner filed a timely appeal at the Eleventh Circuit Court of Appeal for the United States, which affirmed the opinion below in a per curiam opinion on January 21, 2010. The Eleventh Circuit held that:

> A defendant normally only waives a personal jurisdiction defense if he or she has entered an appearance or was involved in overt wrongdoing to deceive the court and avoid service of process. *Sanderford v. Prudential Ins. Co.*, 902 F.2d 897, 899 (11th Cir. 1990). In this case, however, none of these circumstances are present and "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ir. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). This is particularly true in this case where the court must determine whether the constitutional requirements of minimum contacts are satisfied. *See Foster v. Arletty 3 Sarl*, 278 F.3d 409, 413 (4th Cir. 2002) (holding that the defendant, a French company, did not waive its personal jurisdiction defense merely because it was served with process and had notice of the district court proceedings).

Baragona v. Kuwait Gulf Link Transp. Co., 594 F.3d 852, 854 (11th Cir. 2010).

REASONS FOR GRANTING THE PETITION

Review by this Court is necessary to correct the judgment below, which calls for an exercise of this Court's supervisory powers. Sup. Ct. R. 10(a), 10(c). This case involves important questions of federal law that have not been, but should be, settled by this Court. While the majority of lower court authorities are in accord with the decision of the court of appeals below, there are conflicts and inconsistencies within the existing authorities on matters that are important to the effective operation of the federal civil procedural system. Furthermore, much of the confusion in the lower courts appears attributable to a misinterpretation of prior dicta from the decisions of this Court. Accordingly, this Court should act to clarify this important area of federal practice and procedure.

The past patterns of decision in the lower courts however indicate that a summary vacatur and remand may be insufficient to give appropriate guidance. Accordingly, this Court should grant certiorari and set this case for briefing and argument on the merits.

I. Review by this Court is necessary to dispel the confusion among the lower courts as to the distinction between an erroneous judgment and a void judgment in the context of Fed. R. Civ. P. 60(b)(4)

The decision below follows a line of cases that does not allow a Federal Rule 60(b)(4) challenge to a judgment with findings on subject matter jurisdiction, even if erroneous absent a "total want of jurisdiction", but

requires that a district court re-examine a judgment with findings on personal jurisdiction when challenged by Federal Rule 60(b)(4) motion. The inconsistent treatment of final judgments found in these cases is traceable to the dicta found in *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). This inconsistent treatment of final judgments has led to disarray among the lower courts and threatens important federal judicial policies.

A. There is no valid justification to treat alleged errors in the determination of subject matter jurisdiction in a different manner than alleged errors in determinations of personal jurisdiction in the context of motions brought under Federal Rule 60(b)(4)

The Court's recent *United Student Aid Funds, Inc. v. Espinosa* decision, issued after the Eleventh Circuit's decision below, ruled that: "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." 176 L. Ed. 2d 158, 170 (2010). In identifying the type of jurisdictional error that qualifies as "void" under Federal Rule 60(b)(4), *Espinosa* quoted from lower court opinions referring to a lack of "even an 'arguable basis' for jurisdiction," or "a clear usurpation of power." *Id. citing to Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) and *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) ("[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a

judgment void"). Ordinary errors or even obvious ones will not allow for the vacating of a judgment under Federal Rule 60(b)(4). *See, e.g.*, *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 377 (1940) ("If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities.").

The Eleventh Circuit's decision to affirm the trial court's vacating of its default judgment—which had been premised on a finding of personal jurisdiction—pursuant to Federal Rule 60(b)(4) is inconsistent with this Court's authority affirming that federal courts have jurisdiction to determine their jurisdiction, and that such determinations, even if demonstrably erroneous, are not thereby rendered "void." *E.g.*, *Espinosa*, 176 L. Ed. 2d at 170 ("A judgment is not void," for example, "simply because it is or may have been erroneous."); *Durfee v. Duke*, 375 U.S. 106, 113 (1963). "The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." *Chicot County Drainage District*, 308 U.S. at 377 *citing to Stoll v. Gottlieb*, 305 U.S. 165, 171, 172 (1938); *Kalb v. Feurstein*, 308 U.S. 433, 438 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *Evers v. Watson*, 156 U.S. 527, 533 (1895); *Des Moines Navigation & RR Co. v. Iowa Homestead Co.*, 123 U.S. 552, 557-58 (1887). These authorities do not draw a sharp distinction between subject matter and personal jurisdiction in this respect–both are part of the threshold jurisdictional authority of a federal district court. *See e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577-78 (1999).

Nonetheless the treatment of final judgments challenged by Federal Rule 60(b)(4) motions to vacate differs sharply depending on whether the motion seeks to overturn a judgment for lack of subject matter jurisdiction or personal jurisdiction, without any clearly enunciated justification. This unexplained anomaly harms the important federal policy of res judicata.

The decision below departs from *Espinosa*, and this Court's long line of precedent regarding a court's power to adjudge its own jurisdiction, by failing to treat the initial finding on personal jurisdiction by the trial court, even if erroneous, with the same res judicata force as a finding on subject matter jurisdiction by a court, even if erroneous. This problem arises from a widespread misinterpretation of a remark found in *Insurance Corp. of Ireland*, 456 U.S. at 706, and relied upon by the court below.

In *Insurance Corp. of Ireland*, this Court remarked in passing that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Id.* The source for that remark was this Court's own previous decision in *Baldwin v. Iowa State Traveling Men's Association*, where the Court commented that: "[i]f, in the absence of appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction." 283 U.S. 522, 525 (1931). As indicated by their context, these statements were dicta in their respective cases, both of

which actually involved what was once called the "special appearance", a procedural mechanism that was rendered obsolete in the federal system by the Federal Rules of Civil Procedure in 1938.

In *Baldwin*, the case actually involved a "special appearance" as permitted by the law of the forum state, which in that pre-Federal Rules era was applied in federal district courts under the Conformity Act. *Id.* at 523. The actual issue in the case was posed by the Court as one of collateral estoppel and due process: whether, having once litigated and lost the personal jurisdiction issue, the defendant was free to again challenge in another district. *Id.* at 525-26. The Court held that collateral estoppel precluded re-litigation of the issue. *Id.*

Thus, a now-obsolete procedural system—where a defendant, depending upon whether and on what terms a state law permitted a "special appearance", could be put to a stark choice between defending on the merits or preserving a challenge to personal jurisdiction, in the court of first instance, or waiting until an enforcement action or other collateral proceedings to contest—shaped the chain of dicta relied upon by the Eleventh Circuit. One of the procedural innovations of the Federal Rules was to eliminate that dilemma, by allowing a defendant to both defend on the merits and preserve an objection to personal jurisdiction in the district court of first instance, if presented in a timely and proper manner under Federal Rule 12. *See, e.g.*, Fed. R. Civ. P. 12(h). Another procedural innovation of the Federal Rules was Federal Rule 60(b). Prior to the codification of that rule, a post-judgment attack on the jurisdiction

of the original-instance court by definition was a "collateral proceeding"—i.e., a separate and distinct proceeding—and usually was conducted in a different court at the site of enforcement. In contrast, under Federal Rule 60(b), some challenges to the judgment may be presented to the original-instance court, essentially in a continuation of the original proceeding. Thus, the dicta from *Insurance Corp. of Ireland* that supports a challenge of a default judgment "on jurisdictional grounds in a collateral proceeding", *Baragona*, 594 F.3d at 854, seems out-of-place. KGL did not file a Federal Rule motion 60(b)(4) in a collateral proceeding, instead filing the motion in the rendering court.

In essence, the holding in *Insurance Corp. of Ireland* sprang from this archaic distinction. In that case, a foreign defendant had appeared solely to contest personal jurisdiction, but refused to comply with the trial court's subsequent discovery orders. The trial court sanctioned the defendant under Federal Rule 37 by asserting personal jurisdiction over the defendant. 456 U.S. at 705-07. On appeal, the defendant argued in effect that the discovery orders were "void" because personal jurisdiction had not yet been established by proof of "minimum contacts", and the defendant had not voluntarily submitted to the jurisdiction of the court. *Id.* at 701. This Court rejected that argument:

> Petitioners' basic submission is that to apply Rule 37(b)(2) to jurisdictional facts is to allow fiction to get the better of fact and that it is impermissible to use a fiction to establish judicial power, where, as a matter of fact, it

> does not exist. In our view, this represents a fundamental misunderstanding of the nature of personal jurisdiction.

Id. at 701. The Court reasoned that, because the district court had the inherent jurisdiction to determine its jurisdiction, reasonable procedural rules, if consistent with due process, were validly applied to assist the court in reaching its jurisdictional decision, whether or not the defendant voluntarily participated in the process. *Id.* at 702. Personal jurisdiction could be established by the violation of such a procedural rule: "[t]he expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights." *Id.* at 705.

The main question presented by the present case is whether and why the distinctions important to a procedural system rendered obsolete over 70 years ago by the passage of the Federal Civil Rules of Procedure should be kept alive in the very different and more closely integrated system created by the Federal Rules. There is precious little in the lower court decisions to explain why the anachronism should continue, when it obviously conflicts with the letter of the Federal Rules and the important judicial need for resolution and finality. The lack of rationale was recognized by Judge Newman's opinion in *"R" Best Products, Inc v. DiSapio*:

> It might seem anomalous that an appearing party is deemed to waive lack of personal jurisdiction by not properly asserting it in a timely motion or pleading, but a non-appearing party with notice may suffer a

> default judgment and later seek relief under Rule 60(b)(4). Apart from juridical fixation on the concept of voidness, the unstated rationale for the distinction is very likely that a non-appearing defendant, even with notice, should be spared the burden of defending in a distant forum and a plaintiff should be careful to join only those defendants as to whom personal jurisdiction can successfully be established in the original action.

540 F.3d 115, 123 (2d Cir. 2008). What seemed anomalous to Judge Newman is the result of the disparate treatment that has been accorded to judgments challenged by Federal Rule 60(b)(4) motion on the basis of their personal jurisdiction findings and those on the basis of their subject matter jurisdiction findings. This disparate treatment has spread across the lower courts as a result of the misinterpretation of *Insurance Corp. of Ireland* and requires the Court's definitive guidance.

The court of appeals here relied primarily on the *Insurance Corp. of Ireland* dictum, but also sought to distinguish this case from those where the alleged defect was in the service of process, as contrasted with what that court called the defendant's "amenability to jurisdiction," *Baragona*, 594 F.3d at 855, with specific reference to "the constitutional test of minimum contacts making it amenable to jurisdiction." *Id.* In this respect, the court of appeals' analysis is incorrect, as the territorial limits of effective service of process in a case like are given not by the Constitution directly, but rather by the provisions of Rule 4(k).

The court of appeals' analysis below also contradicts the ruling of *Insurance Corp. of Ireland*, which was precisely that "minimum contacts" was not the sine qua non for the assertion of personal jurisdiction, 456 U.S. at 701, as this court has held on several occasions. *E.g.*, *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 621, 622-26 (1990) (rejecting J. Brennan's use of a contacts test to satisfy due process in favor of a "fair play and substantial justice" standard). The obvious and substantial costs of adherence to the archaic *Baldwin* dicta are exemplified by this case. Here, KGL was fully informed of the action, and in fact was served with valid process, on multiple occasions. R-4, R-17. It knew that the district court was concerned with the issue of personal jurisdiction and that the district court intended to take evidence and argument from both sides as a result of the district court's order to serve KGL in Kuwait and its counsel in Washington, D.C. with Plaintiffs' memorandum on personal jurisdiction. R-24 at p.2. It was given specific notice and an opportunity to participate fully in that determination. Under the modern system created by the Federal Rules, KGL could have participated without any prejudice to its right to defend on the merits, and was assured appellate review of any adverse decision. And yet it chose to lurk in the shadows for over four years.

Only after judgment was finally entered did KGL come out of the shadows, and attack the judgment in the very same court to which it had been summoned years before. The underlying policy justifying finality is no better exemplified than here. Petitioners' son died in a tractor trailer accident determined by the Army to have been caused by KGL's negligence, Petitioners

commenced litigation, established a prima facie case of in personum jurisdiction and endured the personal rigors of the litigation including giving testimony during a damages hearing, only to discover that KGL had retained counsel the entire time whose apparent strategy was designed to cause Petitioners to expend their resources for years. This despite the fact that defendant intended to challenge what, if any judgment issued in the same forum that defendant assiduously ignored during the litigation despite district court ordered service.

The emotional burden borne by the family of the deceased serviceman was very high — the long years of litigation over their son's death in combination with the sudden entry of the defendant and the vacatur of the judgment is not a cost that should be ignored or encouraged. Why should this be permitted routinely, when the absent defendant has no good cause for non-participation? Note here that Judge Newman's suggested rationale for allowing a defaulting defendant to challenge a default judgment that the defendant had notice of, as discussed in *"R" Best Products, Inc.*, does not create a sensible defense of KGL's conduct: if it is "inconvenient" for a multinational firm like KGL to defend in the Northern District of Georgia, then presumably it is equally "inconvenient" for KGL to make its Federal Rule 60(b)(4) challenge to that same court and judge. It is not as if KGL's aversion to this forum "spared the burden of defending in a distant forum", which is a principal policy justification for allowing 60(b)(4) collateral attacks upon default judgments. *See, "R" Best Produce, Inc.*, 540 F.3d at 123. In this case,

allowing KGL to both have its cake and eat it too wasted years of time and substantial resources of both the parties and the court, to no discernible end.

From a constitutional point of view, the core concept that should command fairness, not power. The District Court ordered Petitioners to serve their memorandum of law regarding personal jurisdiction on KGL in Kuwait and its counsel in the United States and Petitioners' service upon KGL and its counsel explicitly provided KGL with notice of the Court's proceedings on personal jurisdiction and an opportunity to be heard on the vital issue of personal jurisdiction.

> The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without "due process of law." From these "cryptic and abstract words," Mullane, supra, at 313, we have determined that individuals whose property interests are at stake are entitled to "notice and an opportunity to be heard."

Dusenbery v. United States, 534 U.S. 161, 167 (2002) (internal citations omitted); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) *quoting Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). As this Court has held in a long line of cases, any person who is named as a party and served with process is bound by the courts' determinations, so long as the party has a full and fair opportunity to litigate, whether or not it

chooses to exercise that opportunity. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880 (2008); *Martin v. Wilks*, 490 U.S. 755, 761 (1989). The same principle has been applied to determinations of subject-matter jurisdiction, *Chicot County Drainage District*, 308 U.S. 371, and was again applied most recently in *Espinosa* to Federal Rule 60(b)(4) objections, both on subject-matter jurisdiction and to alleged defects in service, so long as such defects do not work a denial of procedural due process. 176 L. Ed. 2d at 169-70. There appears to be no good reason why the same principle should not be applied to shield determinations of personal jurisdiction from Federal Rule 60(b)(4) motions.

The decision below however ignored the fact that the district court scheduled an evidentiary hearing on personal jurisdiction, directed the Baragonas to serve their memorandum of law on this issue on both KGL and its counsel in the United States and found that the Baragonas had established a prima facie case that the court had personal jurisdiction. App. 50a. Thus the district court ruled that it had jurisdiction over the defendant. The district court's later decision to vacate this decision as a result of KGL's Federal Rule 60(b)(4) motion circumvents the policy of finality implicitly recognized by the Court's ruling in *Espinosa*, which relied upon a long line of decisions. *E.g.*, *Reed v. Allen*, 286 U.S. 191, 201 (1932) ("The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert."). "[R]esjudicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve

judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). This doctrine applies to protect default judgments as well. *E.g.*, *Morris v. Jones*, 329 U.S. 545, 551 (1947) *citing Riehle v. Margolies*, 279 U.S. 218, 225 (1929).

The Eleventh Circuit's decision also failed to take account of the well-founded point of law that *Espinosa* observed: "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." 176 L. Ed. 2d at 170 (internal citations omitted). Neither factor can be found in the *Baragona* case to support the voiding of the judgment pursuant to Federal Rule 60(b)(4). A jurisdictional error that would justify the voiding of a judgment is an "exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id. citing to Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) and *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) ("[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a judgment void"). In *Baragona*, the district court accepted evidence and determined that it could exercise personal jurisdiction under the state long-arm statute. *Baragona*, 594 F.3d at 854. Furthermore, the court below also ignored the service upon of KGL not only of the lawsuit itself, but notice of the personal jurisdiction hearing and Petitioner's memorandum of law regarding personal jurisdiction that the district court relied upon. Neither

a "total want of jurisdiction" nor a deprivation of notice or KGL's opportunity to be heard existed below, as required by *Espinosa* to justify the vacating of a judgment under Federal Rule 60(b)(4).

The unjustified disparate treatment accorded to personal jurisdiction findings in the context of motions brought under Federal Rule 60(b)(4) encourages defendants to sit on the sidelines and cause the plaintiff and the court to expend costly resources to adjudicate the issue of personal jurisdiction twice and threatens the doctrine of finality in the federal court system.

B. Review is warranted to resolve the disarray among the Circuit Courts as to the treatment of an erroneous judgment pursuant to Fed. Rule Civ. P. 60(b)(4)

The treatment of an erroneous judgment challenged by a motion brought under Federal Rule 60(b)(4) has been inconsistent among the lower courts. Numerous courts have recognized the distinction between an erroneous judgment and a void judgment when the defendant challenged the subject matter jurisdiction of the court, ruling that a judgment based upon an incorrect jurisdictional ruling, is not a legal nullity and not subject to vacatur under Fed. R. Civ. P. 60(b)(4) absent a "clear usurpation of power". *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003); *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000); *Raymark Industries, Inc. v. Lai*, 973 F.2d 1125 (3d Cir. 1992); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986); *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985); *Honneus v. Donovan*, 691 F.2d 1, 3 (1st Cir. 1982);

Kansas City S. R. Co. v. Great Lakes Carbon Corp., 624 F.2d 822, 825 n.4 (8th Cir. 1980) *cert. denied*, 449 U.S. 955, 66 L. Ed. 2d 220, 101 S. Ct. 363 (1980), *Lubben v. Selective Service System Local Board*, 453 F.2d 645, 649 (1st Cir. 1972).

Numerous lower courts however have also found that the judgment of a court lacking personal jurisdiction over a defendant is always void, as did the Eleventh Circuit below, and the district court therefore has a nondiscretionary duty to vacate the judgment. *Homer v. Jones-Bey*, 415 F.3d 748, 753 (7th Cir. 2005) (stating during the review of whether the district court denial of a Federal Motion 60(b) to set aside a default motion for insufficient service that "[i]f the district court had no jurisdiction over the movant, its judgment is void and it is an abuse of discretion to deny the movant's request to set aside the judgment under Rule 60(b)."); *Jackson v. FIE Corp.*, 302 F.3d 515, 518 (5th Cir. 2002) (vacating a default judgment despite its prior findings on personal jurisdiction, pursuant to Federal Rule 60(b)(4)); *Sea-Land Serv., Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849, 852 (1st Cir. 1998) ("the First Circuit has held that the district court does not have discretion to deny a Rule 60(b)(4) motion if the challenged judgment was void for lack of personal jurisdiction."); *Printed Media Servs. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993) (vacating default judgment as void despite determination by district court that it could assert personal jurisdiction over the defendant); *Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14, 19 (3d Cir. 1985); *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980). Not a single one of these cases however involve

the fact pattern of this case, where the district court effectively represented the defendant in a *sua sponte* personal jurisdiction adjudication, and required the plaintiff to not only make a prima facie case of personal jurisdiction but to also serve the defendant with plaintiffs' personal jurisdiction memorandum well in advance of the determination on that issue.

There are decisions however that conflict with the rigid adherence to the *Insurance Corp. of Ireland* dicta to allow a collateral attack at any time upon a default judgment for an allegedly erroneous assertion of personal jurisdiction. The Third Circuit in *In re Universal Display & Sign Co.*, shielded a default judgment with an arguably erroneous personal jurisdiction finding from a Federal Rule 60(b)(4) challenge. 541 F.2d 142, 144 (3d Cir. 1976). The Court found that the judgment was not void and was only correctable by the court of appeals. *Id.; see also Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 907 (6th Cir. 2006) ("only judgments that show a jurisdictional defect on the face of the record are classified as void judgments."). Additionally, several circuits have ruled that a party with notice of a proceeding can not later file a Federal Rule 60(b)(4) motion to vacate a default judgment based upon defective service of process. *Sanderford v. Prudential Ins. Co.*, 902 F.2d 897, 899 (11th Cir. 1990); *Wells v. Rockefeller*, 728 F.2d 209, 214 (3d Cir. 1984). There is no reason to view the defective service of process defense on a lesser footing than the

defense of personal jurisdiction, as the Eleventh Circuit did below:

> a defendant that ignores faulty service of process might be found to have waived one component of personal jurisdiction: the defense of improper service of process. They do not, however, hold that a defendant waives the personal jurisdiction defense when it receives notice but does not meet the constitutional test of minimum contacts making it amenable to jurisdiction.

Baragona, 594 F.3d at 855. The waiver of both defenses is governed by Federal Rule 12(h) however and a defendant may waive the right to raise either under the exact same circumstances.

Judge Newman of the Second Circuit recognized the cognitive dissonance surrounding the treatment of default judgments when confronted with a challenge to the district court's personal jurisdiction: "[i]t might seem anomalous that an appearing party is deemed to waive lack of personal jurisdiction by not properly asserting it in a timely motion or pleading, but a non-appearing party with notice may suffer a default judgment and later seek relief under Rule 60(b)(4)." *"R" Best Products, Inc v. DiSapio*, 540 F.3d 115, 123 (2d Cir. 2008). The confusion between the line of decisions supporting *Espinosa* and distinction between void and erroneous decisions, often in the context of subject matter jurisdiction findings, and the line of cases finding that a prior judgment finding personal jurisdiction *must be* vacated as a legal nullity requires this Court's guidance.

II. Federal Rule 60(b)(4) does not create an exception to the waiver rule found in Federal Rule 12(h)

In order to deny Petitioners' appeal below, the Eleventh Circuit distinguished its own precedent *Sanderford*, which found that a defendant's:

> failure to assert the defense of insufficiency of process prior to the entry of final default judgment, at a time when he had actual notice of the action and of the court's entry of final default judgment constitutes waiver of the defense of insufficiency of process.

902 F.2d at 899. In this case, Petitioner argued below that *Sanderford* supported their argument that the notice provided to KGL, of the lawsuit and the subsequent personal jurisdiction adjudication, and KGL's opportunity to be heard created a waiver of KGL's ability to raise a personal jurisdiction defense. The Eleventh Circuit found that the usage of the formulation that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding", *Baragona*, 594 F.3d at 854 *quoting Insurance Corp. of Ireland*, 456 U.S. at 706, was justified "where the court must determine whether the constitutional requirements of minimum contacts are satisfied." *Id. citing to Foster v. Arletty 3 S.A.R.L.*, 278 F.3d 409, 413 (4th Cir. 2002). The application of this quotation in the decision below can not be squared with the language of Federal Rules 12(h) and 60(b)(4). If the

word "party" in both rules means the same thing, which by logic it should, then how can KGL have complied with Federal Rule 12(h)?

Federal Rule 12(h)(1) provides that the defense of personal jurisdiction may be waived by either failing to raise the defense while raising other defenses "under this rule", Fed. R. Civ. P. 12(h)(1)(A), by failing to make the defense in a motion "under this rule", Fed. R. Civ. P. 12(h)(1)(A)(i) or by failing to "include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course." Fed. R. Civ. P. 12(h)(1)(A)(ii). KGL did not make a motion under Federal Rule 12 or file a responsive pleading. Under Federal Rule 12(h), then, KGL waived its right to raise the defense of personal jurisdiction.

Insurance Corp. of Ireland held that a defendant could be subjected to personal jurisdiction through the violation of a federal procedural rule without either the satisfaction of minimum contacts or consent, by recognizing that a federal court has the power to determine its own jurisdiction, including personal jurisdiction. 456 U.S. at 706. A court might establish personal jurisdiction over a defendant through the classic "minimum contacts test", or via the conduct of a defendant whether by waiving their right to assert the personal jurisdiction defense under Fed. R. Civ. P. 12(h), *id.* at 705, or as a punishment for the violation of a jurisdictional discovery order. *Id.* at 705-07. This holding flows from the observation that:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from

> the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

Id. at 702. Thus the conduct of a defendant may constitute a waiver of the defense, e.g. by appearing without raising the defense, *id.* at 703-04, and the court therefore may enter a judgment against the defendant irrespective of the satisfaction of the minimum contacts test. Minimum contacts therefore can not be called a constitutional requirement prior to the assertion of personal jurisdiction over a defendant, despite the Eleventh Circuit Reliance upon the formulation below. *Baragona*, 594 F.3d at 854-55.

The *Insurance Corp. of Ireland* Court also found that a defendant could be subjected to personal jurisdiction without their consent. In *Insurance Corp. of Ireland*, the defendant appeared to contest personal jurisdiction but then violated a discovery order, which resulted in the district court subjecting personal jurisdiction over the defendant as a Fed. R. Civ. P. 37 sanction. 456 U.S. at 699. The *Insurance Corp. of Ireland* Court equated the creation of personal jurisdiction through the use of a procedural rule such as Federal Rule 12(h), with the use of a discovery sanction under Federal Rule 37. *Id.* at 704-05. The

implementation of Federal Procedural Rules can create personal jurisdiction:

> As demonstrated above, the manner in which the court determines whether it has personal jurisdiction may include a variety of legal rules and presumptions, as well as straightforward factfinding. A particular rule may offend the due process standard of *Hammond Packing*, but the mere use of procedural rules does not in itself violate the defendant's due process rights.

Id. at 707. *Insurance Corp. of Ireland* therefore stands for the proposition that KGL's conduct in the context of the Federal Rules of Civil Procedure may create personal jurisdiction without KGL's consent or the satisfaction of the minimum contacts test.

CONCLUSION

Due to the pressing need to dispel the confusion among the lower courts as to the Court's holding in *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982) and to clarify the distinction between erroneous and void judgments in the context of Fed. R. Civ. P. 60(b)(4), as recently stated in *United Student Aid Funds, Inc. v. Espinosa*, 176 L. Ed. 2d 158, 169-70 (2010), and the importance of the federal judicial policies threatened, the Court should grant plenary review and set the case for briefing and argument.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

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April 21, 2010

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 21, 2010

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-12770
Non-Argument Calendar

D.C. Docket No. 05-01267-CV-WSD-1

DOMINIC F. BARAGONA, as the Personal Representative of Lieutenant Colonel Dominic R. Baragona, DOMINIC F. BARAGONA, in his personal Capacity, VILMA D. BARAGONA,

Plaintiff-Appellant,

versus

KUWAIT GULF LINK TRANSPORT COMPANY, MAHMOUD MUHAMMED HESSAIN SEROUR, c/o Kuwait Gulf Link Transport Company,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(January 21, 2010)

Appendix A

Before EDMONDSON, BIRCH and KRAVITCH, Circuit Judges.

PER CURIAM:

Plaintiffs, the father and mother of Dominic R. Baragona, appeal the district court's order vacating a default judgment against the defendants, Kuwait & Gulf Link Transport Company (KGL). We affirm the district court's order.

I. Background

On May 19, 2003, Lieutenant-Colonel Dominic R. Baragona died in a tragic traffic collision with a truck operated by KGL in Iraq. KGL is incorporated under Kuwaiti law and has its principal place of business in Kuwait.

Baragona's father and mother filed suit under Georgia tort law in the United States District Court for the Northern District of Georgia. The Baragonas served KGL by international courier and through the Kuwaiti Ministry of Justice.[1] KGL refused delivery of the complaint and summons but retained counsel in the

1. Service on the Kuwaiti Ministry of Justice was performed under the requirements of the Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which the United States ratified on June 15, 1965, and to which Kuwait acceded on May 2, 2002.

United States to monitor the proceedings.[2] Upon the Baragonas' motion for entry of default, KGL did not appear and the clerk of the court entered a default judgment against KGL for its failure to appear or otherwise answer after service. The district court then scheduled an evidentiary hearing on personal jurisdiction and directed the Baragonas to serve their memorandum of law on this issue on both KGL and its counsel in the United States. The district court found that the Baragonas had established a prima facie case that the court had personal jurisdiction and awarded the Baragonas a default judgment of $ 4,907,048.

KGL then elected to make an appearance in this action by filing a motion to set aside the judgment under Federal Rule of Civil Procedure 60(b)(4). After a hearing, the district court determined that KGL lacked minimum contacts with Georgia sufficient to support the exercise of personal jurisdiction under Georgia's long-arm statute and granted KGL's motion to vacate the default judgment. The Baragonas appeal.

II. Discussion

"We review de novo . . . a district court's ruling upon a Rule 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one." *Burke v. Smith*, 252 F.3d 1260, 1263 (11th

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2. KGL also hired counsel in the United States to represent it in litigation with the United States Army arising out of Baragona's death.

Cir. 2001) (citations and quotation marks omitted). We review the district court's findings of fact for clear error. *United States v. Rhind*, 289 F.3d 690, 693 (11th Cir. 2002).

The Baragonas first argue that KGL waived its personal jurisdiction defense through its "lawyerly gamesmanship" in ignoring valid service, retaining counsel in the United States, monitoring court proceedings, and then filing a motion to vacate the judgment after a default judgment was rendered against it. A defendant normally only waives a personal jurisdiction defense if he or she has entered an appearance or was involved in overt wrongdoing to deceive the court and avoid service of process. *Sanderford v. Prudential Ins. Co.*, 902 F.2d 897, 899 (11th Cir. 1990). In this case, however, none of these circumstances are present and "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ir. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). This is particularly true in this case where the court must determine whether the constitutional requirements of minimum contacts are satisfied. *See Foster v. Arletty 3 Sarl*, 278 F.3d 409, 413 (4th Cir. 2002) (holding that the defendant, a French company, did not waive its personal jurisdiction defense merely because it was served with process and had notice of the district court proceedings).

The Baragonas point to cases they characterize as holding that a defendant's willful ignorance of district court proceedings waives a later challenge to personal jurisdiction. *Sanderford*, 902 F.2d at 899; *Wells v. Rockefeller*, 728 F.2d 209, 214 (3d Cir. 1984). These cases, however, all involve the improper service of process. As we explained in *Prewitt Enterprises, Inc. v. Organization of Petroleum Exporting Countries*:

> The concept of personal jurisdiction comprises two distinct components: amenability to jurisdiction and service of process. Amenability to jurisdiction means that a defendant is within the substantive reach of a forum's jurisdiction under applicable law. Service of process is simply the physical means by which that jurisdiction is asserted.

353 F.3d 916, 925 n.15 (11th Cir. 2003). These cases, therefore, state that a defendant that ignores faulty service of process might be found to have waived one component of personal jurisdiction: the defense of improper service of process. They do not, however, hold that a defendant waives the personal jurisdiction defense when it receives notice but does not meet the constitutional test of minimum contacts making it amenable to jurisdiction.[3]

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3. The court in *Sanderford* stated: "This is not simply a case of personal jurisdiction, as argued by appellant, rather we believe that this case turns on waiver of the defense of insufficiency of process." 902 F.2d at 900.

The Baragonas also argue that KGL waived its personal jurisdiction defense by entering into contracts with the United States government that contain Section 52-228-8 of the Federal Acquisition Regulation. 48 C.F.R. § 52.228-8. They contend that this section, requiring contractors to maintain liability insurance "to indemnify and hold harmless the Government against" third-party personal injury and property loss claims, waives KGL's defense of personal jurisdiction. 48 C.F.R. § 52.228-8(b). This section, however, makes no mention of a waiver of personal jurisdiction and does not alter the required constitutional analysis that the court must consider in lawfully exerting personal jurisdiction over KGL.

Finally, the Baragonas argue that the district court committed clear error when it found that Baragona was killed by a KGL truck under contract with the United Nations World Food Programme. This finding, however, is irrelevant to the Baragonas' argument that the district court had general jurisdiction over KGL because there were "continuous and systematic" contacts between Georgia and KGL. *See Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). Thus, we need not analyze this argument because the Baragonas have not shown how this fact was relevant to or prejudiced their case. *Maiz v. Virani*, 253 F.3d 641, 667 (11th Cir. 2001) ("We will not overturn an evidentiary ruling and order a new trial unless the objecting party has shown a substantial prejudicial effect from the ruling.").

Accordingly, the district court's order is

AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED MAY 8, 2009

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:05-cv-1267-WSD

DOMINIC F. BARAGONA, et al.,

Plaintiffs,

v.

KUWAIT & GULF LINK TRANSPORT COMPANY, et al.,

Defendants.

OPINION AND ORDER

I. INTRODUCTION

This opinion and order addresses for a second time whether the Court has jurisdiction over an action for damages brought in this district by the parents of Lt. Col. Dominic F. Baragona. Lt. Col. Baragona was an active duty member of the United States Army who was riding in an Army vehicle in Iraq when it was struck by truck operated by Defendant Kuwait & Gulf Link

Transport Company ("KGL"). KGL is a Kuwaiti company. Lt. Col. Baragona died as a result of injuries he suffered in the accident.

Lt. Col. Baragona's family sued KGL and the driver of the truck that collided with his vehicle. The driver was an Egyptian national working for KGL in Iraq. From the beginning, the Court has been concerned with whether it had personal jurisdiction over the Defendants. The Court required the Plaintiffs to meet strict service of process requirements to perfect service on KGL in Kuwait. Because of its concern about the exercise of personal jurisdiction over a Kuwaiti company for an action based on an accident in Iraq, the Court required the Plaintiffs to present evidence to support the scope and nature of KGL's contacts with the United States, and with Georgia in particular. Plaintiffs originally presented this evidence at a hearing on January 30, 2007. Plaintiffs' evidence of KGL's contacts with Georgia was presented without the benefit of input or counter-evidence from KGL. Based on the information then presented, the Court determined that Plaintiffs had made the required *prima facie* showing of jurisdiction existed over KGL. KGL failed to answer the complaint or otherwise participate in litigation, and, upon entry of default against KGL and following a hearing pursuant to Federal Rule of Civil Procedure 54, the Court entered default judgment against KGL in the amount of $ 4,907,048.

On February 15, 2008, KGL elected to make an appearance in this action by filing a motion to set aside

the judgment entered against it on the grounds that KGL did not have sufficient contacts with this district or the United States generally for the Court to exercise personal jurisdiction over it. At a hearing on December 5, 2008, the parties were given the opportunity, after conducting discovery on the jurisdictional question, to present evidence and argue whether this Court could exercise personal jurisdiction over KGL. The evidence presented at the hearing provided the Court with a more complete and accurate description of KGL's contacts with this jurisdiction. Importantly, during the hearing the jurisdictional expert retained by the Plaintiffs, and upon whom the Court previously relied when it found a *prima facie* showing of jurisdiction, conceded the absence of KGL's contacts with this district. The adversary system having now been fully engaged and the Court now having a complete and substantial picture of KGL's contacts with Georgia and this district in particular, the Court necessarily concludes that there is no basis for personal jurisdiction over KGL. The Court is compelled to vacate the judgment entered against KGL and dismiss this action for lack of jurisdiction.

II. BACKGROUND

On May 19, 2003, the United States Army HMMWV in which Lt. Col. Baragona was riding collided with a truck owned by defendant KGL and driven by defendant Serour. Lt. Col. Baragona died of injuries sustained in the accident.

Appendix B

On May 12, 2005, Plaintiffs filed this action, in their personal capacities and as representatives of Lt. Col. Baragona's estate, against Serour and KGL. KGL is incorporated under Kuwaiti law and has its principal place of business in Kuwait. Defendant Serour is an Egyptian citizen. Plaintiffs assert that the Court has diversity jurisdiction over this action, 28 U.S.C. § 1332(a), and personal jurisdiction over the Defendants pursuant to Georgia's long-arm statute, O.C.G.A. § 9-10-91(1). Plaintiffs assert claims for negligence and wrongful death.

Pursuant to the Court's February 10, 2006 Order, Plaintiffs served KGL pursuant to international mail courier.[1] On March 15, 2006, KGL refused delivery of the Complaint and summons.[2] On July 28, 2006, Plaintiffs

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1. Plaintiffs initially attempted to serve KGL through the Kuwaiti Ministry of Justice, pursuant to the requirements of the Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which the United States ratified on June 15, 1965 and to which Kuwait acceded on May 2, 2002. Plaintiffs moved for leave to serve via international courier after the Kuwaiti government failed to timely comply with its service obligations under the Hague Convention.

2. Plaintiffs filed an identical action in the United States District Court for the Northern District of Alabama and attempted service in the same manner. *See Baragona, et al. v. Kuwait Gulf Link Transport Co., et al.*, No. 05-cv-1049-CLS (N.D. Ala. May 19, 2005). On March 14, 2006, Saeed Esmail Dashti, KGL's Chairman and Managing Director, signed for and opened the Complaint in the Alabama action, which is nearly identical to the Complaint in this action. Mr. Dashti read the Complaint and returned it to the courier. KGL refused delivery of the Complaint in this action on the following day.

moved for entry of default against KGL for KGL's failure to appear and failure to accept service. Fed. R. Civ. P. 55(a). On August 21, 2006, the Clerk of the Court entered default against KGL.

On October 26, 2006, Plaintiffs moved for a second entry of default against KGL. Plaintiffs had learned, with the assistance of the Procurement Fraud Branch of the Department of the Army and others in the United States government, that on July 11, 2006, KGL had accepted service from the Kuwaiti Ministry of Justice pursuant to the Hague Convention. The Clerk of Court entered a second default against KGL on January 10, 2007.[3]

On January 30, 2007, the Court held a hearing to determine whether it has personal jurisdiction over KGL under the Georgia long-arm statute and the Due Process Clause of the Fourteenth Amendment. Although given notice of the hearing, KGL elected not to appear. Plaintiffs submitted a memorandum addressing whether the Court had personal jurisdiction over KGL. Attached to it was the declaration of retired Army Lieutenant Colonel Paul Winston Schwartz, a former United States Army contracting officer who

3. Defendant Serour has not appeared in this action. Serour was in his 60s when the accident occurred and sustained serious injuries in the crash. He was treated for his injuries at a Coalition hospital in Basra, Iraq before returning to Kuwait. Serour subsequently quit his job with KGL and returned to Egypt. Plaintiffs have not located Serour and have not served him. *See* Baragona AR 15-6 Investigation Report Exh. 22, at Exh. 1 to KGL's Post-Hearing Reply Br.

Plaintiffs identified as a contracting expert. Lt. Col. Schwartz explained the contracting office for the Third United States Army was headquartered at Fort McPherson, Atlanta, Georgia. He explained that the Third Army is the Army Component of the United States Central Command, the joint forces command responsible for the Middle East region. Also attached to the Plaintiffs' memorandum was a list of what appeared initially to be over one hundred contracts entered into between KGL and the "U.S. Army Central Cmd – Kuwait." *See*, Lt. Col. Schwartz explained in his declaration that each of those contracts would have been administered by the Principal Assistant Responsible for Contracting ("PARC") stationed at Fort McPherson. He further explained that a Contracting Officer stationed at Fort McPherson or elsewhere would have been responsible for day-to-day administration of the contracts.

On April 9, 2007, the Court determined: "Plaintiffs submitted an affidavit setting forth a number of contacts between Defendants and the state of Georgia, including contracts formed between Defendants and government entities located at Fort McPherson, Georgia. Plaintiffs have shown a *prima facie* case that the Court has personal jurisdiction over the Defendants in this case." April 9, 2007 Order at 2; *see also Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988), *cert. denied*, 494 U.S. 1081, 110 S. Ct. 1813, 108 L. Ed. 2d 943 (1990). On November 5, 2007, the Court entered default judgment against KGL in the amount of $ 4,907,048.

Appendix B

On February 15, 2008, KGL for the first time appeared in this action by filing its motion to vacate the judgment entered against it on November 5, 2007. KGL claims the judgment is void because the Court lacked personal jurisdiction over it.

On June 18, 2008, the Court entered an Order evaluating KGL's motion to vacate. The Court determined there was a material conflict between the evidence submitted by the Plaintiffs and by KGL regarding KGL's contacts with the State of Georgia. KGL proffered evidence that all contract formation between it and agencies of the United States occurred outside the United States and that KGL did not have any other contacts with entities in the United States. KGL argued that the Army's decision to administer its contracts in Georgia was without KGL's knowledge or consent. The Court ordered limited discovery directed at the jurisdictional issue.

On December 5, 2008, the Court held a seven-hour evidentiary hearing at which KGL presented testimony and documentary evidence in support of its motion to vacate. The Court ordered limited post-hearing briefing. That briefing is now complete, and this matter is ripe for decision.[4]

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4. Plaintiffs have filed two additional motions requiring brief consideration. On February 4, 2009, Plaintiffs filed a motion requesting that the Court solicit a statement of interest from the United States Department of Defense. Plaintiffs argue the Defense Department may wish to make use of 28 U.S.C.

(Cont'd)

III. GOVERNING LAW

A. *Motion to Vacate*

Federal Rule of Civil Procedure 60(b)(4) permits a defendant to move for relief from a final judgment on the grounds that the judgment is void. Fed. R. Civ. P. 60(b)(4). A final judgment is void against any defendant over which the Court lacks personal jurisdiction. *Sloss Indus. Corp. v. Euriso,* 1 488 F.3d 922, 924 (11th Cir. 2007). "Rule 60(b)(4) allows a litigant – even one who does not initially appear – to collaterally attack a judgment on the ground that it is void due to lack of personal jurisdiction." *Id.* "Unlike motions pursuant to other subsections of Rule 60(b), Rule 60(b)(4) motions leave no margin for consideration of the district court's discretion as the judgments themselves are by definition either legal nullities or not." *Id.* at 925 (internal quotation marks omitted).

The plaintiff normally bears the burden to show personal jurisdiction over a defendant. The burden of

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(Cont'd)

§ 517, which permits the Attorney General to send an Executive Branch official to attend to the interests of the United States in court proceedings. On March 4, 2009, Plaintiffs filed a motion seeking referral of this case to nonbinding mediation because of a proposed bill in the United States Senate which would, if it became law, prospectively confer jurisdiction on this Court for causes of action against foreign contractors such as KGL. The Court considers both motions after addressing the threshold jurisdictional issue.

proof for a Rule 60(b)(4) motion generally rests with the defendant. *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1298-99 (11th Cir. 2003). The Eleventh Circuit has stated, however, that the plaintiff continues to bear the ultimate burden of establishing that personal jurisdiction is present in a case such as this where the defendant initially defaults and subsequently moves pursuant to Rule 60(b)(4) to challenge the Court's jurisdiction. *Oldfield v. Pueblo de Bahia Lora, S.A.*, 558 F.3d 1210, 1217 (11th Cir. 2009) ("It goes without saying that, where the defendant challenges the court's exercise of jurisdiction over its person, the plaintiff bears the ultimate burden of establishing that personal jurisdiction is present."). Accordingly, the Court must consider whether Plaintiffs' jurisdictional allegations are controverted by KGL's declarations, keeping in mind that even where the evidence submitted by the parties conflicts, the Court still must construe all reasonable inferences in favor of the Plaintiffs. *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988); *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990).

B. *Personal Jurisdiction*

"The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). Unlike subject matter jurisdiction, which is limited by Article III of the Constitution and, for the lower federal courts, by statutory grants of jurisdiction, "[t]he

requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.*

"Personal jurisdiction generally entails a two-step inquiry." *Sloss*, 488 F.3d at 925. In the matter before it, the Court must first determine whether the exercise of jurisdiction is appropriate under Georgia's long-arm statute. *Id.* Second, the Court must examine whether exercising jurisdiction over the defendant would violate the Due Process Clause of the Fourteenth Amendment, which requires that the defendant have minimum contacts with the forum state, id., and that the exercise of jurisdiction not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

In the context of a motion to dismiss for lack of personal jurisdiction where – such as here – defendant KGL failed to appear and contest personal jurisdiction, Plaintiffs bore the burden of establishing a *prima facie* case of personal jurisdiction over KGL. *Morris*, 843 F.2d at 492; *Delong*, 840 F.2d at 845. "A *prima facie* case is established if the plaintiff presents sufficient evidence to defeat a motion for a directed verdict. The district court must construe the allegations in the complaint as true, to the extent they are uncontroverted by the defendant's affidavits or deposition testimony." *Morris*, 843 F.2d at 492 (internal citations omitted).

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On the basis of the Plaintiffs' briefing and the affidavit of Lt. Col. Schwartz, the Court previously determined that Plaintiffs had shown a *prima facie* case of personal jurisdiction over KGL. April 9, 2007 Order at 2. The Court necessarily determined that Georgia's long-arm statute, O.C.G.A. § 9-10-91(1), "'grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State,'" *id.* (quoting *Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank*, 279 Ga. 672, 620 S.E.2d 352, 355 (Ga. 2005)), and that Plaintiffs had shown a *prima facie* case that the Georgia long-arm statute permitted the exercise of jurisdiction over KGL. KGL does not contest the Court's determination that the exercise of jurisdiction over it is permitted by the Georgia long-arm statute. KGL's Mot. to Vacate at 5; KGL's Post-Hrg Br.

KGL challenges whether the Court's exercise of jurisdiction over it violates the Due Process Clause of the Fourteenth Amendment. "The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Helicopteros Nacionales de Colombia, S.A v. Hall*, 466 U.S. 408, 413-14, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). When a controversy is related to or arises out of the defendant's specific contacts with a forum, a State is said to be exercising "specific jurisdiction" over the defendant. *Id.* at 414 n.8. "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been

said to be exercising 'general jurisdiction' over the defendant." *Id.* at 414 n.9. Because Plaintiffs in this case do not allege that this action arises out of or is related to KGL's alleged contacts with the State of Georgia, the question here is whether the Court has "general jurisdiction" over KGL.

To exercise general jurisdiction over a person, the Supreme Court requires that person to have "minimum contacts" with the State seeking to exercise jurisdiction over the Defendant. *Helicopteros*, 466 U.S. at 416. "Minimum contacts" is a requirement that necessitates "a showing of continuous and systematic general business contacts between the defendant and the forum state." *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1292 (11th Cir. 2000), *cert. denied*, 534 U.S. 827, 122 S. Ct. 68, 151 L. Ed. 2d 34 (2001); accord *Helicopteros*, 466 U.S. at 416. Whether a defendant's general business contacts are sufficiently continuous and systematic to justify the exercise of general jurisdiction must be evaluated on a case-by-case basis.

The Supreme Court has offered limited guidance on what contacts are and are not sufficient to justify an exercise of general jurisdiction. For example, sending a corporate officer to a State for contract negotiations, accepting checks drawn on a State's banks, purchasing goods from the State, and sending personnel to the State for training purposes do not together constitute sufficient "continuous and systematic" general contacts to support an exercise of jurisdiction. *Helicopteros*, 466 U.S. at 416-17. The Supreme Court has reasoned that

intentional contacts with a forum State are what are required to be sufficient to justify the exercise of jurisdiction in that particular State. That is, unilateral activity by a plaintiff or a third-party will not suffice to establish continuous and systematic general contacts between the defendant and the forum state. *Id.* at 417.[5] In each case the Court must determine on the record in that case whether the contacts are sufficient for general jurisdiction to be exercised over a defendant. *See, e.g., Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 279-80 (4th Cir. 2009) (four telephone conversations and twenty-four emails are not alone sufficient to satisfy minimum contacts with the Commonwealth of Virginia).

If the plaintiff shows that the defendant has sufficient minimum contacts, the Court must next consider whether the assertion of personal jurisdiction over the defendant would comport with "'traditional notions of fair play and substantial justice.'" *Morris*, 843 F.2d at 492 (quoting *Int'l Shoe*, 326 U.S. at 316). In evaluating whether "fair play and substantial justice" permit the exercise of jurisdiction, the Court should consider the burden on the defendant in defending the lawsuit, the forum State's interest in adjudicating the

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5. "Common sense and everyday experience suggest that, absent unusual circumstances, the bank on which a check is drawn is generally of little consequence to the payee and is a matter left to the discretion of the drawer. Such unilateral activity of another party of a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros*, 466 U.S. at 416-17.

dispute, the plaintiff's interest in convenient and effective relief, the interstate judicial system's interest in efficient resolution of controversies, and the shared interest of the States in furthering fundamental substantive social policies. *Madara*, 916 F.2d at 1517 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

Finally, because personal jurisdiction represents an individual's constitutional right, "it can, like other such rights, be waived." *Insurance Corp. of Ireland*, 456 U.S. at 703. An individual may voluntarily subject himself to the jurisdiction of a court by appearance or may contract in advance to submit to the jurisdiction of a given court. *Id.* at 703-04. An individual's defense for lack of personal jurisdiction may be waived if not asserted in a timely motion or in a responsive pleading. Fed. R. Civ. P. 12(h); *id.* at 704; *Oldfield*, 558 F.3d at 1218 n.21.

A party does not, however, waive its defense for lack of personal jurisdiction simply by failing to appear and thus defaulting, even if the party received proper service of the action. While it is preferred that a party engage the litigation process by making an appearance for the limited purpose of challenging the court's jurisdiction, "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding. By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: That

decision will be res judicata on that issue in any further proceedings." *Insurance Corp. of Ireland*, 456 U.S. at 706 (citations omitted); accord *Sloss*, 488 F.3d at 924. The reason for this is grounded in the constitutional limitations of personal jurisdiction. A court either has personal jurisdiction over a party, or it does not. If not, the court's default judgment is void and unenforceable. *Sloss*, 488 F.3d at 924.

IV. DISCUSSION

This case comes before the Court after years of pretrial proceedings in which Plaintiffs have tried repeatedly and in varying ways to cause KGL to appear and answer for allegedly causing the death of Lt. Col. Baragona in Iraq. Not until a substantial default judgment was entered against it, and after official inquiries into its conduct by the Procurement Fraud Branch of the United States Army, did KGL finally appear to defend itself, nearly three years into the litigation. The Court considers KGL's conduct to be regrettable, if not defiant, especially given its multi-year relationship with various arms of the United States Government, from which KGL profited substantially. The Court is constrained, however, to exercise its jurisdiction only as far as the Due Process Clause permits. Because the evidence before the Court shows KGL did not have sufficient minimum contacts with Georgia, the Court cannot exercise personal jurisdiction over KGL in this district, and the judgment against KGL is required to be vacated.

Appendix B

A. *KGL 's Motion to Vacate*

1. Development of Factual Record at the December 2008 Evidentiary Hearing

At the evidentiary hearing on December 5, 2008, KGL appeared and presented testimonial and documentary evidence conflicting significantly with the evidence originally submitted by the Plaintiffs in support of default judgment. The Court evaluates whether it has jurisdiction over KGL on the basis of this now developed factual record.

KGL introduced into evidence sixteen separate contracts with the United States Government with effective award dates between 1995 and 2004. *See* KGL Post-Hearing Br., Appendix ("KGL App.") at 132-34; KGL Hrg. Exh. 1. Each contract's cover page shows the government organization issuing the contract, the office to which KGL was required to submit invoices, and the office from which payment to KGL would be made. KGL App. at 135-69; KGL Hrg. Exhs. 2-17. Every contract introduced into evidence was issued by a United States Government organization outside the United States. Most contracts were issued by the United States Army Central Command – Kuwait, at Camp Doha, Kuwait. The contracts occasionally were issued by "ARCENT-KU DIRECTORATE OF CONTRACTING," which testimony at the evidentiary hearing established was an abbreviation for the Army Central Command – Kuwait. KGL App. at 54. One contract was issued by the Naval Regional Contracting Center Naples, Detachment Bahrain. KGL App. at 142.

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The sixteen contracts required KGL to submit its invoices to United States Government finance offices in Kuwait. Payment to KGL also was made from Government finance offices in Kuwait, often from Camp Doha and occasionally from other locations within Kuwait. In all, the contract documents submitted into evidence do not refer at any point to Fort McPherson or even to Georgia generally. In fact, none of the writings suggests the contracts had any activity occurring in or directed to any location in the United States. This evidence directly contradicts evidence presented to the Court by the Plaintiffs earlier in this action.

KGL presented the testimony of Stany Sequeira. Sequeira was the Operations Manager for KGL from 1982 to 2006. Sequeira Testimony, Hrg. Tr. at 12, KGL App. at 3.[6] From 1982 to 2006, Sequeira's role as operations manager at KGL included carrying out KGL's contracts with United States Government entities. *Id.*[7]

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6. Sequeira currently is a commercial advisor to the chairman of the board of KGL Transportation Company ("KGLTC"). *Id.* at 3-4. KGLTC is a separate corporate entity from the defendant in this case, KGL. *Id.* at 6. KGL and KGLTC are headquartered in different cities in Kuwait. *Id.* at 33. The two companies do not share corporate officers, board members, or executives. *Id.* at 34. KGLTC was formed in May 2005, and Sequeira was transferred from KGL to KGLTC in 2006. *Id.* at 7.

7. When KGLTC was formed, KGL still had approximately one month remaining before completion on one of its United States Army contracts. KGL App. at 9. KGLTC assumed that contract obligation for approximately one month from May to June 2005. *Id.* at 9-10.

KGL does not have any employees, property, offices or assets in the United States. *Id.* at 36-37.

Sequeira testified that all contracts between KGL and the Army were paid by the Army Central Command Finance Support Unit, which is located at Camp Doha in Kuwait. KGL App. at 56. Contact numbers for ARCENT-KU were listed as Kuwaiti phone numbers. *Id.* at 54. When KGL was paid on its Army contracts, the Army Central Command Finance Support Unit in Kuwait remitted payment drawn on a Kuwaiti bank in Kuwaiti dollars to KGL's local bank account in Kuwait. *Id.* at 62-63. Sequeira would sometimes pick up payments, tendered in the form of checks, from Camp Doha in Kuwait. *Id.* at 62.

Sequeira testified that he occasionally met the contracting officers assigned to KGL's Army contracts at Camp Doha. *Id.* at 60. Sequeira testified that in his administration of KGL's United States Army contracts he did not ever speak to anyone in Georgia or contact anyone in Georgia. *Id.* at 61. Sequeira frequently communicated with the Army's Installation Transportation Officer ("ITO"), the Army official who decided where equipment and services from KGL would be delivered. *Id.* at 57. Sequeira spoke with the ITO almost daily. Each time, this communication was made between Sequeira and an individual in Kuwait. *Id.* at 64. To the best of Sequeira's knowledge, bids for KGL's Army contracts originated in Kuwait and were filled in Kuwait. *Id.* at 65. The contracts themselves were signed at Camp Doha. *Id.*

Sequeira never met with or spoke to individuals in Georgia during his administration of KGL's contracts. KGL App. at 60-61. He never received correspondence from anyone in Georgia. *Id.* at 64-65. Before these proceedings, Sequeira testified that he had never heard of a PARC stationed at Fort McPherson. *Id.* at 60-61.

KGL also presented the testimony of Ahmed Afify, currently a member of Global United Insurance Company and formerly an attorney for KGL. KGL App. at 12-13. Afify worked as an attorney for KGL from 1988 to 2007. Afify also conducted the document search, employee interviews, and compiled employee questionnaires relied upon by KGL at the December 2008 hearing. *Id.* at 15, 20-21.[8]

Afify led the effort to survey all KGL and KGLTC employees in Kuwait. The employees were given a paper survey requiring them to inform KGL "of any contacts, communications, contracts, visits (with companies or individuals) [the employee had] made with the United States whether through physical attendance, correspondence by email, fax, telephone, or any other communication method, during [the employee's] work with KGL or any of its subsidiaries from the period beginning January 1998 until January 2008." KGL App. at 176. None of the surveys identified any contacts by KGL employees with persons in or travel to the United States. *Id.* at 18. Afify also coordinated with the human

8. Plaintiffs argue these employee surveys are not credible or complete because Afify did not survey former employees of KGL or KGLTC. Pls.' Post-Hrg Br. at 14.

resources departments in KGL and KGLTC to review the travel records of employees. Afify did not find any evidence of anyone from KGL or KGLTC ever visiting Georgia. *Id.* at 24.[9] Afify confirmed these survey responses by cross-checking the responses with financial department records. *Id.* at 19-20. Afify's searches of documents from KGL and KGLTC located no documents or communications referring to a PARC or to Fort McPherson, Georgia. *Id.* at 27.

Afifty also testified to the corporate organization of KGL and KGLTC. KGL "spun off" its operational activities to corporate subsidiaries, including KGLTC. KGL App. at 32-33. KGL and KGLTC have separate officers, directors, executives, employees, and offices in different cities in Kuwait. *Id.* at 33-34. Both companies observe full corporate formalities such as board meetings and shareholders meetings. *Id.* at 35.

KGL next presented the testimony of Philip Sordian, the chief operating officer and vice chairman of KGLTC. KGL App. at 74. KGLTC was not formed until May 18, 2005. *Id.* at 76.[10] KGLTC is a minority shareholder in KGL Transportation Company, L.L.C., a Delaware

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9. KGL tendered at the December 2008 hearing a summary of the survey responses received by Afify. The Court did not admit this survey into evidence, however, because KGL failed to comply with the requirements of Fed. R. Evid. 1006. The Court admitted testimony describing the survey results.

10. This action was filed on May 12, 2005, six days before KGLTC was formed.

limited liability company formed in February 2007. *Id.* at 79-80. KGL Transportation Company, L.L.C. was formed in part to help KGLTC recover monies from the United States Army. *Id.* Sordian testified KGL Transportation Company, L.L.C. has no assets or employees and offers no services. *Id.* at 79. From June 2005 to September 2008, KGLTC did not do any contracting business with the United States Government. Id. at 80. Sordian took several trips to the United States in his capacity as COO of KGLTC, to Philadelphia, Charleston, South Carolina, Washington, D.C., and New Jersey. *Id.* at 81-82. None of Sordian's trips was to Georgia. *Id.*[11]

Lt. Col. Schwartz also testified at the December 5, 2008 hearing. Lt. Col. Schwartz explained that his knowledge of the Third Army's relationship with Fort McPherson came from his three-year duty tour at Fort McPherson in the 1980s and from general Internet research he undertook to prepare his testimony to the Court.[12] KGL App. at 91-92. He also explained that the

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11. Plaintiffs argue Mr. Sordian's testimony is not credible. Pls.' Post-Hrg. Br. at 11-14. Plaintiffs argue Mr. Sordian's recollection of never meeting anyone from the United States Government or military is not credible because he testified to attending meetings in Charleston, Washington, D.C., and New Jersey at which United States government personnel would have been present. Plaintiffs have not presented any evidence or discredited Sordian's testimony that none of his meetings in the United States occurred in Georgia.

12. The limited basis of Lt. Col. Schwartz's testimony was not previously made clear to the Court.

relationship between the Third Army, United States Central Command, and forward operating areas was highly complex and in flux during the time period relevant to this case. *Id.* at 82.

Lt. Col. Schwartz testified that the commander of the Army's component to the United States Central Command moved its headquarters from Fort McPherson, Georgia to Kuwait on November 11, 2001. *Id.* at 93. The headquarters of the United States Central Command itself is located at Fort MacDill, Florida. *Id.* Lt. Col. Schwartz also testified that the Army could, in its discretion, change the geographic location of Major Commands or operational units, such as the Third Army, to different bases within the United States or in forward locations. *Id.* at 94-99. Contractors working for the United States Army would not be solicited for approval of a move. *Id.* at 99. ARCENT continues to be headquartered in Kuwait. *Id.* at 100.

Lt. Col. Schwartz testified that in approximately October 2002, the PARC for the Third Army became the ARCENT Southwest Asia Contracting Command. *Id.* at 102, 108. Lt. Col. Schwartz testified that he "was in error" when he stated in his earlier sworn declaration filed with the Court that the PARC for the Third Army was located at all times in Fort McPherson, Georgia. *Id.*

Lt. Col. Schwartz testified he believed it would be appropriate to require "sophisticated" contractors of the Third Army to be sued in Georgia. KGL App. at 124-28. Lt. Col. Schwartz based his conclusion on the notion that

a sophisticated contractor would "have to play by [the] foreign power's rules." *Id.* at 127. Under Lt. Col. Schwartz's hypothesis, personal jurisdiction would be appropriate over a major, sophisticated United States Government contractor in any jurisdiction in which the Army, in its discretion, chose to move the headquarters of the Army contracting entity. *Id.* at 129-30. In Col. Schwartz's opinion, the place where contracts were executed or administered or where a contractor received payment would not be important to the analysis of where the contractor could be subject to personal jurisdiction. *Id.* at 115.

Finally, Plaintiffs presented the deposition testimony of Benjamin Fluhart. Mr. Fluhart was employed by KGLTC from March 2007 to June 2008 and lived and worked in the United States during that time. Pls.' App. at 66. Fluhart was employed to obtain payment on invoices owed to KGLTC by the United States Army. *Id.* at 67. Fluhart testified that he made contact on behalf of KGLTC with various people and entities in the Unites States Government, including the Army. *Id.* at 69. Fluhart conducted business in the Washington, D.C. area and kept a post office box on behalf of KGLTC in Maryland. *Id.* at 83. Plaintiffs do not identify any of Fluhart's activities that occurred in or were directed toward Georgia.

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2. Analysis

The Court's initial concern in this matter was whether the record contained sufficient information for the Court to make a constitutionally permissible ruling on its jurisdiction over KGL. In evaluating this jurisdictional question, the Court was impeded by the refusal of KGL to participate in the adversarial system and now realizes the testimony presented by Lt. Col. Schwartz was based on scant investigation, personal experiences that were not coextensive with the relevant time period in this case, and beliefs about the constitutional exercise of personal jurisdiction that are in conflict with applicable legal precedent and logic. The December 2008 hearing and the parties' additional submissions expanded the factual record available to the Court and represent a clear and reasonable basis for the Court to evaluate the issue before it. With this new information, it is clear KGL does not have sufficient contacts with this forum to establish jurisdiction, and the judgment entered by the Court against KGL is void and must be vacated.

Evidence presented at the December 5, 2008, hearing establishes, almost without doubt, that KGL's contacts with the United States Army were exclusively military contracts for transportation services in Kuwait. The evidence shows that all contracts were negotiated and executed in Kuwait, that all services were performed in Kuwait, and that all payment was made from Kuwait to KGL's accounts in Kuwait. The evidence further showed that the Third Army's headquarters, the only

tangible connection alleged by Plaintiffs to connect KGL to Georgia, had in fact been moved to Kuwait well before Lt. Col. Baragona was killed. Lt. Col. Schwartz's declaration upon which the Court found a *prima facie* case of personal jurisdiction relied heavily on the existence of a PARC stationed at Fort McPherson. It now appears that assertion was wrong; the PARC responsible for KGL's contracts was reassigned as the ARCENT Southwest Asia Contracting Command and operated in Kuwait.[13] KGL's officers and employees testified that during their performance of KGL's contract with the United States Army they never communicated with or had any relation to anyone in Georgia. To the extent they ever communicated with United States government officials or military personnel, those individuals were stationed in Kuwait.

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13. The Court previously relied on Lt. Col. Schwartz's interpretation of a spreadsheet purporting to show over one hundred contracts between KGL and the "U.S. Army Central Cmd - Kuwait.". Closer examination of that spreadsheet reveals most entries are in fact separate entries for the performance of one contract, as identified by a unique Contract Number. The Court cross-referenced this spreadsheet with evidence presented by KGL at the December 2008 hearing. The Court confirmed that, based on the coversheets for each actual contract, all of the distinct contracts (as known by Contract Number) entered into between KGL and the U.S. Army, except for one, were negotiated, entered into, paid, and administered in Kuwait. See KGL Hrg. Exh. 1 at Tabs E, F, H, I, J, K, L, M, & N. The only contract for which KGL did not present evidence confirming its exclusive relationship to Kuwait is Contract Number W912D104C0004 valued at $ 241,071.00. Plaintiffs have not presented any evidence connecting Contract Number W912D104C0004 to Georgia.

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Plaintiffs persist in arguing in support of jurisdiction in this district. Plaintiffs first attempt to discredit the testimony and evidence offered by KGL. Plaintiffs primarily allege that KGL's witnesses are not credible. For instance, Plaintiffs allege Mr. Afify's testimony is not credible because it relies on survey data that failed to survey former employees or on record searches that did not search materials over five years old (the document retention requirement under Kuwaiti law). Plaintiffs also allege Mr. Sordian's testimony is inherently incredible because it is not believable that he could have attended military contractor events in the United States and not interacted with United States Government officials.

The Court finds the testimony presented by KGL to be sufficiently credible. Plaintiffs have not alleged or shown any facts to discredit KGL's witnesses. The testimony of Ben Fluhart establishes that KGLTC had, at most, very limited contacts with individuals in the United States; it does not discredit KGL's assertion that it had no contact with individuals in the United States or the assertion that KGLTC's foreign employees had no contact from May 2005 to September 2008 with individuals in the United States. KGL's evidence also is internally consistent and credibly supports KGL's general assertion that it does not have any contacts with Georgia. Plaintiffs have not been able to identify anything or anyone connecting KGL to Georgia.

Plaintiffs next attempt to connect KGLTC to the United States. This is a flawed argument. KGLTC is

not a defendant in this case, and the evidence in the record shows that KGL and KGLTC are wholly separate corporate entities. Even if the Court could connect KGL and KGLTC for the purposes of establishing jurisdiction, all of KGLTC's alleged activities in the United States were in Washington, D.C., Philadelphia, New Jersey, and Charleston, South Carolina – not Georgia.

Plaintiffs make conflicting arguments that either KGL should be generally subject to jurisdiction in the United States because of its military contracts with the United States Government or, alternatively, that this is a specific jurisdiction case because the cause of action "relates" to KGL's military contracts with the United States. The latter argument is discredited by the factual record. The evidence in the record shows that KGL's driver was acting on a contract for the World Food Programme when the truck he was driving struck and killed Lt. Col. Baragona. It is undisputed that the KGL driver was not acting on a United States military contract at the time of the accident. There simply is no support for Plaintiffs' notion that this is a specific jurisdiction case.

Plaintiff's overarching argument is that KGL should be subject to jurisdiction in the United States in any State in which the United States Army chooses to administer its contracts. Lt. Col. Schwartz's theory of jurisdiction is founded on this flawed hypothesis: a "sophisticated" foreign entity that contracts with the United States Government should be subject to jurisdiction in whatever State the United States

Government unilaterally chooses to administer the contract. This theory would have two practical consequences: a foreign contractor would be subject to suit in the United States even if it never communicated with individuals or entities in the United States and even if its employees never set foot on United States soil; and the location of that suit could be effectively determined by the United States Government based upon where the Government chooses to "administer" the contracts.

The Court is not aware of any other court that has addressed this issue. On first impression, the Court concludes the due process clause does not permit exercising jurisdiction over a United States military contractor in the State where the military chooses to administer the contract, independent of any other contacts between the contractor and the State. A contrary ruling would offend the fundamental principles of jurisdiction embedded in the Fourteenth Amendment's due process clause. The foundation of jurisdiction is whether a defendant "purposely avails" himself of the benefits (and burdens) of the forum State. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*,

357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). Due process requires an even higher standard when the cause of action does not relate to the defendant's connections with the forum. "Minimum contacts" for "general" jurisdiction requires "a showing of continuous and systematic general business contacts between the defendant and the forum state." *Consol. Dev. Corp.*, 216 F.3d at 1292; accord *Helicopteros*, 466 U.S. at 416.

KGL simply does not have enough contacts with the State of Georgia to subject itself to suit here. In fact, the expanded record now shows that KGL's contacts with Georgia are nonexistent or *de minimis* at best.[14] The Constitution does not permit the Court to hold KGL liable in this State where there is no evidence that KGL "purposely availed" itself of anything or has any "continuous or systematic" contacts with the State.

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14. The parties originally conceded that jurisdiction over KGL was proper under the Georgia long-arm statute. Having now determined that KGL has essentially no contact with Georgia, the Court also concludes that Georgia's long-arm statute is not satisfied. O.C.G.A. § 90-10-91(1) "authorizes a Georgia court to exercise personal jurisdiction over a nonresident who '[t]ransacts any business within' Georgia." *Innovative Clinical*, 620 S.E.2d at 355. This subsection "grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State . . . . to the maximum extent permitted by procedural due process." *Id.* (internal quotation marks omitted). The evidence now establishes that KGL does not transact any business in Georgia and that exercising jurisdiction over KGL would offend constitutional due process. Georgia's long-arm jurisdiction does not extend to KGL.

Plaintiffs' argument, and specifically the argument made by Lt. Col. Schwartz at the December 2008 hearing, asks the Court to entirely disregard KGL's actual contacts with Georgia and rule instead based on KGL's "general" contacts with the United States Government. This argument effectively ignores the Due Process Clause. It would be unprecedented to subject a company to suit and judgment in a forum in which it has not consented to its burdens or experienced its benefits, based on the opposing party's unilateral decision to move its contracting and administrative facilities there. It also would effectively establish universal jurisdiction in the United States for any government contractor, includes foreign entities, which have no other contact or relationship with the United States.[15]

Plaintiffs' final argument is that KGL has waived its ability to contest jurisdiction. Plaintiffs argue that given the unique facts of KGL's conduct in this case the Court should find that KGL is estopped from moving to vacate the judgment. In *Sanderford v. Prudential Ins. Co. of Am.*, 902 F.2d 897 (11th Cir. 1990), the Eleventh

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15. This case is about general jurisdiction over a foreign United States military contractor. The Court takes no position on any other situation, such as a specific jurisdiction situation where the alleged injury occurs during the performance of contractual duties. The Court also takes no position on the validity or scope of waiver provisions which might be found in the contracts themselves or in the Federal Acquisition Regulation. The evidence establishes that KGL did not consent to jurisdiction in Georgia, and that is as far as the Court's inquiry extends.

Circuit held that a third-party defendant waived his ability to assert the defense of insufficiency of process by waiting until collateral proceedings to raise the defense. The summons served on the defendant inadvertently omitted the number of days the defendant had to respond to the complaint, a technical service error under Fed. R. Civ. P. 4(a)(1). *Id.* at 899. The defendant indisputably had notice of the action. After the district court entered default judgment, the defendant moved to vacate the judgment because the Court did not acquire jurisdiction over him through insufficient process. *Id.* at 899-900. The Eleventh Circuit held, "that if a summons is in substantial compliance with Rule 4(b), F. R. Civ. P., and a defendant has not been prejudiced by the defect in the summons, the defendant must raise his or her Rule 12(b)(4), F. R. Civ. P., defense by motion or in a responsive pleading, or risk having waived that defense if he or she waits until final default judgment has been entered." *Id.* at 900.

Plaintiffs extrapolate from *Sanderford* that a defendant waives its personal jurisdiction defense by failing to raise it before default judgment is entered. This is not the law. "A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Insurance Corp. of Ireland*, 456 U.S. at 706 (citations omitted). There is no question in this case that KGL had notice of this action and that Plaintiffs went to great efforts to serve it. KGL instead argues that it lacks sufficient minimum contacts with the forum State. Rule 60(b)(4) permits a defendant who

is properly served and who has notice of an action to default, risk default judgment, and move subsequently to void the judgment for lack of jurisdiction. *E.g.*, *Oldfield*, 558 F.3d at 1217 (vacating district court's order denying properly-served defendant's motion to set aside default judgment for lack of personal jurisdiction); *Sloss*, 488 F.3d 922 (properly served defendant moved pursuant to Rule 60(b)(4) to set aside default judgment for lack of personal jurisdiction).

Plaintiffs also assert KGL waived its personal jurisdiction defense by entering into contracts containing third-party insurance provisions. FAR 55-228.8. Plaintiffs do not specify how, if at all, the FAR operates to modify the constitutional standards of jurisdiction. Regardless of whether KGL should in fact be liable for its injuries to Lt. Col. Baragona, the Court's inquiry is limited to whether it can constitutionally exercise jurisdiction over KGL. The Court has determined it cannot, and the FAR provisions for third-party insurance do not change the relevant constitutional standards.

Plaintiffs finally argue that if the Court finds sufficient minimum contacts do not exist they will amend the complaint to utilized Federal Rule 4(k)(2). Rule 4(k)(2) provides:

> (2) ***Federal Claim Outside State-Court Jurisdiction***. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

> (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
>
> (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Fed. R. Civ. P. 4(k)(2). "Rule 4(k)(2) thus sanctions personal jurisdiction over foreign defendants for claims arising under federal law when the defendant has sufficient contacts with the nation as a whole to justify the imposition of United States' law but without sufficient contacts to satisfy the long-arm statute of any particular state." *S.E.C. v. Carrillo*, 115 F.3d 1540, 1543-44 (11th Cir. 1997) (quotations omitted). Rule 4(k)(2) establishes nationwide jurisdiction for foreign defendants for claims arising under federal law. The claims in this case are for wrongful death and negligence, neither of which arises under federal law. Plaintiffs confusingly assert that the federal cause of action is a "third party beneficiary lawsuit on the FAR provision 52.228-8 against KGL." Pls.' Post-Hrg. Br. at 20 n.7. Plaintiffs do not allege how they are foreseeable third-party benefits of the FAR, how KGL violated the FAR by not obtaining third-party insurance, or how Plaintiffs possess private standing to raise an alleged violation of the FAR. This case does not arise under federal law, and Fed. R. Civ. P. 4(k)(2) does not apply.

Appendix B

B. *Plaintiffs' Motion for an Order Soliciting a Statement of Interest from the Department of Defense*

Plaintiffs also move the Court to request from the Department of Defense a statement of interest regarding the applicability of certain provisions of the Federal Acquisition Regulations ("FAR").[16] Pursuant to 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States." 28 U.S.C. § 517.

Plaintiffs assert that section 52.228-8 of the FAR effectively waives a government contractor's ability to assert a personal jurisdiction defense in cases asserting third-party liability. Section 52.228-8 provides:

> Liability and Insurance—Leased Motor Vehicles (May 1999)

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16. The FAR regulates contracting practices between the United States Government and private entities. "The Federal Acquisition Regulations System, which is issued under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, 'consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR.'" *DeFrank v. Army Fleet Support, L.L.C.*, No. 1:07-cv-775, 2009 U.S. Dist. LEXIS 22720, 2009 WL 737113, at *5 n.15 (M.D. Ala. Mar. 20, 2009) (quoting 48 C.F.R. § 1.101).

Appendix B

(a) The Government shall be responsible for loss of or damage to—

(1) Leased vehicles, except for—

(i) Normal wear and tear; and

(ii) Loss or damage caused by the negligence of the Contractor, its agents, or employees; and

(2) Property of third persons, or the injury or death of third persons, if the Government is liable for such loss, damage, injury, or death under the Federal Tort Claims Act (28 U.S.C. 2671-2680).

(b) The Contractor shall be liable for, and shall indemnify and hold harmless the Government against, all actions or claims for loss of or damage to property or the injury or death of persons, resulting from the fault, negligence, or wrongful act or omission of the Contractor, its agents, or employees.

(c) The Contractor shall provide and maintain insurance covering its liabilities under paragraph (b) of this clause, in amounts of at least $200,000 per person and $ 500,000 per occurrence for death or bodily injury and $20,000 per occurrence for property damage or loss.

> (d) Before commencing work under this contract, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the interests of the Government shall not be effective (1) for such period as the laws of the State in which this contract is to be performed prescribe or (2) until 30 days after written notice to the Contracting Officer, whichever period is longer. The policies shall exclude any claim by the insurer for subrogation against the Government by reason of any payment under the policies.
>
> (e) The contract price shall not include any costs for insurance or contingency to cover losses, damage, injury, or death for which the Government is responsible under paragraph (a) of this clause.

Plaintiffs argue the requirement in subsection (e) that a government contractor obtain liability insurance for third-party claims asserted against it effectively waives a contractor's ability to assert a personal jurisdiction defense. Plaintiffs assert this is a first impression issue of nationwide significance. They assert this provision of the FAR would be "rendered a nullity" if government contractors could avoid suit by asserting the absence of personal jurisdiction. KGL argues

participation by the Defense Department is not appropriate or warranted in this case.

The Court determines a solicitation to the Defense Department is not appropriate in this case. What Plaintiffs request is practically untenable. 28 U.S.C. § 517 does not provide a mechanism through which a court can solicit the participation of the United States. The section merely authorizes the Attorney General to send the Solicitor General or another officer of the United States to attend to the nation's interest in court proceedings. The section does not require or even provide for a court to request the participation of the United States in the litigation here. In this case, which has been pending for nearly four years and about which the Department of Defense in unquestionably aware, the United States has chosen not to appear. The Court is not inclined to disturb that choice.

C. *Plaintiffs' Motion for Referral of the Case to Mediation*

On March 4, 2009, Plaintiffs requested the Court to refer this case, which has been pending for nearly four years, to non-binding mediation. KGL opposes mediation.

Local Rule 16.7 permits the Court to refer any civil case to a non-binding alternative dispute resolution process, such as mediation. The rule provides:

> A judge may in his or her discretion refer any civil case to a non-binding ADR process, e.g.

> early neutral evaluation, mediation, or non-binding arbitration. Upon the consent of the parties, the judge may refer any civil case to binding arbitration, binding summary jury trial or bench trial, or other binding ADR process.
>
> The timing of the referral to a binding or non-binding ADR process under this section is within the discretion of the referring judge.

LR 16.7(B)(1), NDGa. Whether to refer a case to mediation is within the Court's discretion.

Plaintiffs suggest non-binding mediation would be appropriate at this stage of the litigation because "both parties are at far too great a risk posture to prudently continue litigation." Plaintiffs argue they are at risk because the Court's decision on the pending motion to vacate may adversely affect them. Plaintiffs argue KGL is at risk because legislation currently pending in the United States Senate may effectively terminate KGL's contracting activities with the United States Government because of KGL's conduct in this litigation. Plaintiffs assert mediation would "serve to find common ground among the parties and avoid the further expenditure of litigation costs and other future consequences of continued litigation."

KGL opposes mediation. It argues the matter is finally ripe for the Court to issue a final ruling on personal jurisdiction. It also informs the Court that the

Army's Procurement Fraud Branch informed KGL on February 6, 2009, that it does not intend to initiate suspension and debarment proceedings against the company. KGL further argues that mediation could be appropriate at the appellate level after this Court rules on the pending motion to vacate. *See* Fed. R. App. P. 33; 11th Cir. R. 33-1(c).

On March 4, 2009, United States Senator Claire McCaskill (Mo.) introduced the Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act. S. 526, 111th Cong. § 1 (2009) (as referred to S. Comm. on Homeland Sec. & Gov't Affairs). The bill is cosponsored by Sen. Robert P. Casey, Jr. (Pa.) and Sen. Mel Martinez (Fla.). The bill would require the Director of the Office of Management and Budget to amend the FAR to include a mandatory waiver of personal jurisdiction in the federal courts of the United States for United States government contractors. The bill also would provide for the availability of suspension or debarment proceedings against a contractor who refuses or fails to appear before a United States federal court in a matter brought against the contractor in connection with the contractor's performance of its contract with the United States government.

Plaintiffs assert this bill exposes KGL to liability in this case. The Court disagrees. The bill has not come to a vote in the Senate Committee and has not been voted

on by either chamber of Congress.[17] Mediation would not serve a practical purpose, especially where KGL has indicated it does not consent to mediation. By design, mediation has prospects for success only where the parties to it are willing participants.

The Court has entered judgment against KGL in this case. The only question remaining is whether that judgment is enforceable against KGL. If the Court lacks personal jurisdiction over KGL, the judgment is by definition void. As Plaintiffs point out, the Court has repeatedly implored the parties to find a sensible resolution to this dispute. The parties have failed to do this, and the better course now is for the Court to decide the jurisdictional question.

V. CONCLUSION

The Court holds that exercising jurisdiction over KGL would offend the constitutional requirements of sufficient minimum contacts with the State of Georgia and traditional notions of fair play and substantial justice. The expanded evidence in this case establishes almost no connection between KGL and Georgia. In the absence of jurisdiction over KGL, the judgment entered against it is void and must be vacated.

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17. Even if it were to pass, several provisions of the bill provide that it does not apply retroactively. The bill could not apply to KGL's conduct in this case, and any future harm to KGL from suspension or debarment is purely hypothetical.

Appendix B

The Court's holding is not meant to approve of KGL's conduct in this litigation. The Court is rightly bound by constitutional standards of due process and cannot enforce a judgment against a party over which it lacks jurisdiction. But, as the Court communicated to the parties in the December 2008 hearing, KGL's conduct in this case was indignant and callous. KGL derived substantial revenue from its contracts with the United States Army. KGL and other Kuwaitis received unquantifiable benefits from the protection the United States Armed Forces have provided to Kuwait for over fifteen years. For KGL to then turn a blind eye to the death caused by a KGL employee of a United States service member, who was on duty protecting the region at the time of the incident, is an affront to the solemn sacrifices service members such as Lt. Col. Baragona honorably provided to Iraq and the citizens of other countries in the Middle East region. KGL took this callousness even further by causing Plaintiffs to expend nearly four years and significant expense in merely getting the question of jurisdiction before the Court. The Court implored KGL to work with Plaintiffs to fashion a just resolution in this case, but this request was ignored. Despite these concerns, the Court cannot constitutionally exercise jurisdiction over a party lacking sufficient minimum contacts with the forum. Indeed, this Court and all courts in the United States seek to enforce the rule of law – the bedrock of our democracy. This Court abides by its charge to seek just and constitutional results, in spite of KGL's irresponsible participation in this process. The Court necessarily takes no position on which courts, in the United States or abroad, might

have jurisdiction over KGL, or on what the ultimate resolution of this case would be in an appropriate forum.

For the foregoing reasons,

IT IS HEREBY ORDERED that KGL's Motion to Vacate Default Judgment is **GRANTED**. Plaintiffs' Motion for an Order Soliciting a Statement of Interest from the Department of Defense and Plaintiffs' Motion for a Referral of the Case to Mediation are both **DENIED**.

IT IS HEREBY FURTHER ORDERED that the Court's judgment against KGL is **VACATED**. This action is hereby **DISMISSED**.

SO ORDERED this 8th day of May 2009.

/s/ William S. Duffey, Jr
WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED APRIL 9, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:05-cv-1267-WSD

DOMINIC F. BARAGONA, et. al.

Plaintiffs,

v.

KUWAIT GULF LINK TRANSPORT COMPANY and MAHMOUD MUHAMMED HESSAIN SEROUR,

Defendants.

ORDER

This matter is before the Court on Plaintiffs' Motion for a Hearing on Damages [16].

On January 30, 2007, this Court held a hearing to determine whether the Court had personal jurisdiction over the Defendants under the Georgia Long Arm Statute, O.C.G.A. § 9-10-91(1). The Court was specifically concerned, in light of Georgia precedent limiting the "transacts business" prong of the Long Arm statute,

whether Defendants' alleged contractual relationships with entities in Georgia were sufficient to sustain jurisdiction in this tort action. Where a Defendant has, as here, defaulted, the plaintiff bears a burden to establish *a prima facie* case that the Court has personal jurisdiction over the defendant. *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988).

On March 2, 2007, counsel for the Plaintiff submitted a memorandum of law demonstrating that the Georgia Supreme Court recently expanded the Georgia Long Arm statute to the fullest extent permitted by the Constitution. *Innovative Clinical & Consulting Servs., LLC v. First Nat. Bank*, 620 S.E.2d 352 (Ga. 2005). The Georgia Supreme Court specifically held that the previously-limited "transacts business" prong, § 9-10-91(1), "grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State." *Id.* at 675. Plaintiffs submitted an affidavit setting forth a number of contacts between Defendants and the state of Georgia, including contracts formed between Defendants and government entities located at Fort MacPherson, Georgia. Plaintiffs have shown *a prima facie* case that the Court has personal jurisdiction over the Defendants in this case.[1]

---

1. Plaintiffs expended considerable effort to serve Kuwait Gulf Link Transport Company, a Kuwaiti entity ("KGL"), notice of this lawsuit. Plaintiffs attempted to serve KGL on multiple occasions, through the Kuwaiti Ministry of Justice, and, with (Cont'd)

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion for a Hearing on Damages [16] is **GRANTED.** A hearing for damages with respect to defaulted Defendant Kuwait Gulf & Link Transport Company shall be held at 10:00 a.m. on April 25, 2007, in Courtroom 1705, 75 Spring St. S.W., Atlanta, Georgia.

SO ORDERED, this 9th day of April, 2007.

s/ William S. Duffey
WILLIAM S. DUFFEY,
UNITED STATES DISTRICT JUDGE

(Cont'd)
the permission of the court, through alternate and more direct means. KGL, in a collateral proceeding, acknowledged receiving service as of July 11, 2006. At the Court's direction, Plaintiffs also served the March 2, 2007 Memorandum of Law and its exhibits on Defendant's counsel and on Defendant KGL directly via Federal Express International Delivery. A KGL employee signed for the letter containing the Memorandum on March 5, 2007. Neither KGL nor its counsel have submitted a response to Plaintiffs' Memorandum.

Supreme Court, U.S.
FILED
MAY 21 2010
OFFICE OF THE CLERK

No. 09-1280

IN THE

Supreme Court of the United States

DOMINIC BARAGONA, *et al.*,

Petitioners,

v.

KUWAIT GULF LINK TRANSPORT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a district court may set aside as void a default judgment against a foreign defendant pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure based on a finding on undisputed evidence that the defendant lacks any minimum contacts with the forum.

Whether a defendant that lacks any minimum contacts with the forum waives its defense of lack of personal jurisdiction by not voluntarily appearing in the district court prior to the entry of judgment.

DISCLOSURE STATEMENT

Respondent Kuwait & Gulf Link Transport Company (erroneously called Kuwait Gulf Link Transport Company in the case caption) has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

In its brief opinion below, the court of appeals affirmed the district court's order vacating a default judgment against Respondent Kuwait & Gulf Link Transport Company ("KGL") on the ground that the court lacked personal jurisdiction over KGL, a company incorporated under Kuwaiti law with its principal place of business in Kuwait. Pet. App. 1a-7a. That ruling was made on the basis of undisputed evidence that KGL did not have any contacts with the State of Georgia, the forum state in which Petitioners brought suit against it. The Petition contains an incomplete account of the pertinent undisputed facts.

A. The District Court's Initial Jurisdictional Finding And Default Judgment.

On May 12, 2005, Petitioners filed suit against KGL under Georgia tort law in the United States District Court for the Northern District of Georgia. Pet. App. 2a, 11a. Petitioners alleged claims for negligence and wrongful death arising from a vehicle accident in Iraq. *Id.* at 11a. Petitioners asserted the district court had diversity jurisdiction over the action and personal jurisdiction over KGL under Georgia's long-arm statute. *Id.* KGL, which is incorporated under Kuwaiti law and has its principal place of business in Kuwait, declined to answer the complaint or otherwise appear in the district court. *Id.* at 9a.

From the outset, the district court was concerned about whether it had personal jurisdiction over a Kuwaiti company for an action based on an accident in Iraq. *Id.* It therefore required Petitioners to present evidence to support the scope and nature of KGL's contacts with the United States, and with Georgia in particular. *Id.*

At an evidentiary hearing held "without the benefit of input or counter-evidence from KGL" (*id.*), Petitioners submitted a declaration of a retired United States Army contracting officer whom they identified as a contracting expert. *Id.* at 13a. That witness asserted that the contracting office for the Third United States Army was headquartered at Fort McPherson in Atlanta, Georgia. *Id.* at 13a. He explained that the Third Army is the Army Component of the United States Central Command, the joint forces command responsible for the Middle East region. *Id.* Petitioners also submitted a spreadsheet purporting to identify over one hundred contracts entered into between KGL and the "U.S. Army Central Cmd—Kuwait." *Id.* at 13a, 32a & n.32. Petitioners' witness asserted that each of those contracts would have been administered by the Army at Fort McPherson, Georgia. *Id.* at 13a.

Based solely on that evidence—which later turned out to be mistaken—the district court determined that Petitioners had made a *prima facie* showing that it had personal jurisdiction over KGL. *Id.* at 9a, 13a.

In November 2007, after entry of default against KGL and a hearing on damages, the district court entered a default judgment against KGL in the amount of more than $4.9 million. *Id.* at 3a, 9a, 13a.

B. KGL's Motion To Set Aside The Default Judgment And The District Court's Findings.

On February 15, 2008, KGL moved under Rule 60(b)(4) of the Federal Rules of Civil Procedure for relief from the judgment on the ground that KGL did not have sufficient contacts with the district or with the United States generally for the court to exercise jurisdiction over it. *Id.* at 9a-10a. The district court determined there was a material conflict between the evidence presented by KGL and that previously presented by Petitioners regarding KGL's contacts with the State of Georgia, and permitted Petitioners to conduct discovery directed at the jurisdictional issue. *Id.* at 10a, 14a. It then held a seven-hour evidentiary hearing at which both parties were given the opportunity to present testimonial and documentary evidence. *Id.* at 10a, 14a.

KGL presented three witnesses, including its former operations manager who had been responsible for administering KGL's contracts with the U.S. Army, an in-house attorney who had surveyed all of KGL's employees in Kuwait regarding their contacts with the United States, and the chief operating officer and vice chairman of a corporate subsidiary, who testified regarding the company's contacts with the United States. *Id.* at 24a-28a. It also introduced into evidence sixteen separate contracts with the United States Government with effective award dates between 1995 and 2004. *Id.* at 23a. Every contract introduced into evidence was issued by a U.S. Government organization outside the United States, was to be performed in the Middle East, required KGL to submit its invoices in Kuwait, and contemplated payment from U.S.

Government finance offices in Kuwait; none contained any reference to Fort McPherson or to Georgia generally. *Id.* at 23a-24a.

At the hearing, the expert retained by Petitioners, upon whose declaration the district court had previously relied when it found a *prima facie* showing of jurisdiction, also testified. *Id.* at 28a. Significantly, that witness "conceded the absence of KGL's contacts" with the forum. *Id.* at 10a. The witness explained that his prior declaration had been based on his three-year tour of duty at Fort McPherson in the 1980s and on general Internet research—a "limited basis" the district court observed "was not previously made clear to the Court." *Id.* at 28a & n.12. The witness admitted that he "was in error" when he stated in his earlier sworn declaration that the Third Army's responsible contracting office was located at all times in Fort McPherson, Georgia, and that in fact, the Army's contracting component had moved its headquarters from Fort McPherson to Kuwait in late 2001, long before the vehicle accident occurred in May 2003. *Id.* at 32a. As for the spreadsheet that the witness had interpreted as showing over a hundred different contracts between KGL and the U.S. Army, the court found on "[c]loser examination" that most of those entries related to the performance of a single contract. *Id.* at 32a n.13. The district court concluded that the prior testimony offered by Petitioners' expert "was based on scant investigation, personal experiences that were not coextensive with the relevant time period in this case, and beliefs about the constitutional exercise of personal jurisdiction that are in conflict with applicable legal precedent and logic." *Id.* at 31a.

Based on the evidence presented at the hearing, the district court found that KGL's contacts with the United States Army were exclusively military contracts for transportation services in Kuwait. *Id.* at 31a. The evidence showed that all of those contracts were negotiated and executed in Kuwait, that all services were performed in Kuwait, and that all payment was made from Kuwait to KGL's accounts in Kuwait. *Id.*

In short, the district court found that the evidence presented at the hearing supported "KGL's general assertion that it does not have any contacts with Georgia." *Id.* at 33a. Indeed, the district court found that "[Petitioners] have not been able to identify anything or anyone connecting KGL to Georgia." *Id.* To the contrary, "the expanded record now shows that KGL's contacts with Georgia are nonexistent or *de minimis* at best." *Id.* at 36a (footnote omitted); *see also id.* at n.14 (court determined that KGL has "essentially no contact" with Georgia). Explaining that the hearing had provided the court with "a more complete and accurate description" of KGL's contacts with the forum than Petitioners previously had provided, the district court ruled that there was no basis for it to assert personal jurisdiction over KGL, and granted KGL's motion to vacate the default judgment against it. *Id.* at 10a, 49a.

C. The Court of Appeals' Decision.

In a brief per curiam opinion, the Eleventh Circuit affirmed. Pet. App. 1a-7a. The court first addressed Petitioners' contention that KGL had waived its right to contest personal jurisdiction by waiting to raise the

issue until after a default judgment was rendered against it. *Id.* at 4a. As the court explained (*id.*), that argument is irreconcilable with this Court's recognition in *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982), that a "defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." Petitioners' other waiver arguments were based principally on cases involving improper or defective service of process. *Id.* at 5a. As the court explained, however, those cases hold only that a defendant with notice of an action who ignores defective service waives the defense of improper service of process. *Id.* They do not hold that a defendant waives a defense of lack of personal jurisdiction when it receives notice of an action, since the Constitution imposes the separate requirement that a defendant have minimum contacts with the forum so as to render it amenable to jurisdiction. *Id.*

REASONS FOR DENYING THE PETITION

Petitioners seek certiorari on the premise that the lower courts are in "disarray" over the "important question" of the circumstances under which Rule 60(b)(4) of the Federal Rules of Civil Procedure permits a district court to vacate a judgment for lack of personal jurisdiction over the defendant. Pet. 8-9. In fact, there is no such conflict. Petitioners admit at the outset that "the majority of lower court authorities are in accord with the decision of the court of appeals below." *Id.* at 8. Indeed, every federal circuit to have addressed the issue holds that a nonresident defendant with notice of an action against it may decline to appear and later

move under Rule 60(b)(4) to set aside a judgment entered without personal jurisdiction over it. *See id.* at 22 (recognizing that "[n]umerous lower courts . . . have also found that the judgment of a court lacking personal jurisdiction over a defendant is always void, as did the Eleventh Circuit below, and the district court therefore has a nondiscretionary duty to vacate the judgment"). Petitioners do not cite a single case that holds otherwise, and to our knowledge, there is none.

Nor does this case present any important question of federal law. Rather, it involves nothing more than a straightforward application of Rule 60(b)(4), which by its plain terms authorizes a district court to set aside a void judgment, such as one rendered without personal jurisdiction over the defendant. Petitioners do not dispute the district court's finding that it lacked personal jurisdiction over Respondent KGL. They do not dispute that Rule 60(b)(4) allows a defendant to challenge the court's personal jurisdiction after entry of a default judgment. Petitioners' assertion that this procedural mechanism is at odds with the rule that a court has jurisdiction to determine its own jurisdiction simply ignores the distinction between a defendant who voluntarily appears and pleads under Rule 12, and one who does not. Petitioners' theory that notice of a pending action alone is sufficient to establish personal jurisdiction is directly contrary to this Court's authority, and finds no support in this Court's recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010).

I.

THERE IS NO CONFLICT AMONG THE LOWER COURTS OR OTHER GROUND WARRANTING CERTIORARI.

"The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). Unlike subject matter jurisdiction, which is an Article III and statutory requirement, "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* at 702 (footnote omitted). The test for personal jurisdiction requires that the defendant must have minimum contacts with the forum state, and that the exercise of jurisdiction must not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Rule 60(b)(4) of the Federal Rules of Civil Procedure permits a defendant to move for relief from a final judgment on the ground that the judgment is void. FED. R. CIV. P. 60(b)(4); *Klapprott v. United States*, 335 U.S. 601, 609 (1949). A judgment entered without personal jurisdiction over the defendant violates the Due Process Clause of the Fourteenth Amendment, rendering it void. *E.g.*, *Burnham v. Superior Court*, 495 U.S. 604, 608-09 (1990). This jurisdictional principle is so fundamental that there is no time limit on an attack on a judgment as void, because such a judgment cannot

acquire validity through the passage of time. *See Klapprott*, 335 U.S. at 609 (a court may "set aside a 'void judgment' without regard to the limitation of a year applicable to motions to set aside on some other grounds"); *Jackson v. FIE Corp.*, 302 F.3d 515, 523 n.23 (5th Cir. 2002).

Here, the court of appeals' decision applying these principles is entirely consistent with settled law, and does not present any grounds for certiorari.

A. It Is Settled Law That A Defendant May Always Move Under Rule 60(b)(4) To Vacate A Default Judgment For Lack Of Personal Jurisdiction.

"A defendant who knows of an action but believes the court lacks jurisdiction over his person or over the subject matter generally has an election." *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987). First, a defendant may appear in the trial court and move to dismiss under Rule 12(b)(2). *Id.* Alternatively, a defendant may decline to appear, allow the entry of a default judgment, and later move under Rule 60(b)(4) for relief from the judgment as void for lack of jurisdiction. *Id.*

The Federal Rules express no preference between the two. This Court has unambiguously held that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706

(1982) ("*Insurance Corp. of Ireland*"); *see also Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931) ("[defendant] had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment . . . [defendant] could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction"). As a result, courts routinely vacate default judgments for lack of personal jurisdiction over foreign defendants who, although aware of the proceedings, declined to appear and move to dismiss under Rule 12(b). *See, e.g.*, *Foster v. Arletty 3 S.A.R.L.*, 278 F.3d 409, 413 (4th Cir. 2002) (vacating default judgment against French defendant for lack of personal jurisdiction); *Thos P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (vacating default judgment against Costa Rican defendant for lack of personal jurisdiction); *see also* cases cited, Pet. 22.

Petitioners have no basis to denigrate as mere dicta the rule set forth in *Insurance Corp. of Ireland*. Pet. 11-12. The rule is entirely consistent with the Court's earlier decision in *Baldwin*, and is grounded in bedrock principles of individual liberty, which recognize that the judgment of a court lacking personal jurisdiction is void. Indeed, the rule is so uncontroversial that every circuit court to address the issue has either followed, or independently arrived at a conclusion consistent with, this Court's opinion in *Insurance Corp. of Ireland*. *See, e.g.*, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2nd Cir. 1998) (quoting *Insurance Corp. of Ireland*, 456 U.S. at 706); *Budget Blinds, Inc. v. White*, 536 F.3d 244, 260 (3rd Cir. 2008)

(same); *Foster*, 278 F.3d at 413 (same); *MCI Telecoms. Corp. v. Alhadhood*, 82 F.3d 658, 662 (5th Cir. 1996) (same); *United States v. Bigford*, 365 F.3d 859, 865 (10th Cir. 2004) (same); *Practical Concepts, Inc.*, 811 F.2d at 1547 (same); *Ganis Corp. of California v. Jackson*, 822 F.2d 194, 196 (1st Cir. 1987) (district court properly heard motion to set aside judgment for lack of personal jurisdiction where defendant knew of action but did not appear); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1113 (6th Cir. 1994) (same); *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1034 (7th Cir. 2000) (same); *Thos P. Gonzalez Corp.*, 614 F.2d at 1256 (same); *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 924 (11th Cir. 2007) (same).

In short, the Eleventh Circuit's decision below is consistent with the overwhelming weight of authority. There is no conflict among the lower courts that could warrant review by this Court.

B. Setting Aside Judgments That Are Void For Lack Of Personal Jurisdiction Does Not Conflict With The Rule That A Court May Determine Its Own Jurisdiction When A Party Voluntarily Appears.

Petitioners assert that this Court's decision in *Insurance Corp. of Ireland* has sown "confusion" among the lower courts because, in Petitioners' view, the nondiscretionary duty to vacate judgments for lack of personal jurisdiction contradicts the rule that a court may determine its own jurisdiction, and that such determinations—"even if erroneous"—are res judicata. Pet. 8, 11. They contend further that there is no

corresponding duty where subject matter jurisdiction is concerned, leading to disparate results depending on the nature of the jurisdictional defense. *Id.* at 21-22. Petitioners' claims are groundless.

As to the only issue presented below—the availability of relief for lack of personal jurisdiction—Petitioners cite no case holding that a party lacking minimum contacts with a forum who declines to appear in an action against it may be barred on res judicata grounds from later raising a jurisdictional defense. That result would be flatly inconsistent with the rule in *Insurance Corp. of Ireland* and *Baldwin*. Moreover, as the instant case clearly demonstrates, giving res judicata effect to a district court's initial jurisdictional finding, made without the benefit of the defendant's input, would risk "erroneous" (Pet. 11) results based on mistaken evidence of the defendant's supposed contacts with the forum.

As to their claim of "disparate treatment" for subject matter jurisdiction, which was not at issue below, Petitioners' own authorities establish that the "nondiscretionary duty" to vacate void judgments applies *regardless* of the nature of the jurisdictional defect. *See, e.g., Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985) (holding courts have "no discretion" in determining whether to set aside a judgment that is void for lack of subject matter jurisdiction); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982) (same).

Contrary to Petitioners' theory, res judicata turns on whether the movant voluntarily appeared in the district court to contest its jurisdiction prior to

judgment, not on the nature of the jurisdictional defense at issue. If a defendant appears and submits to the court's jurisdiction "for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: That decision will be res judicata on that issue in any further proceedings." *Insurance Corp. of Ireland*, 456 U.S. at 706. By the same token, a court's determination that it has jurisdiction of the subject matter is binding on that issue if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject-matter jurisdiction and failed to do so. *Durfee v. Duke*, 375 U.S. 106, 112 (1963); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940).

Petitioners' own authorities illustrate this rule. Nearly all of the cases Petitioners cite for their theory that subject matter jurisdiction is treated differently under Rule 60(b)(4) involved parties who voluntarily appeared in the initial proceedings, making a later collateral attack improper. Pet. 21.[1] Conversely, nearly

[1] *See Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 206 (5th Cir. 2003); *United States v. Tittjung*, 235 F.3d 330, 335-36 (7th Cir. 2000); *Nemaizer v. Baker*, 793 F.2d 58, 60 (2nd Cir. 1986); *Honneus*, 691 F.2d at 2; *Kansas City S. R. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 823 (8th Cir. 1980); *Lubben v. Selective Serv. Sys. Local Bd.*, 453 F.2d 645, 647 (1st Cir. 1972); *but see Watts*, 752 F.2d at 410 (affirming vacatur where movant appeared in initial proceedings on ground that Rule 60(b)(4) motion was a direct attack on void judgment). Petitioners also rely on *Raymark Indus., Inc. v. Lai*, 973 F.2d 1125 (3rd Cir. 1992), which did not involve a motion under Rule 60(b)(4) and is therefore inapposite.

all of the cases Petitioners cite addressing a defect in personal jurisdiction involved parties who did *not* appear in the initial proceedings, thereby preserving their right to raise the issue under Rule 60(b)(4). *Id.* at 22.[2]

Petitioners erroneously suggest that lower courts have departed from the *Insurance Corp. of Ireland* rule. Pet. 23. Not so. In one of the cases cited by Petitioners, the defendants were denied relief under Rule 60(b) because they had already unsuccessfully litigated the jurisdictional defense by appearing and filing a motion to dismiss under Rule 12(b)(2)—an outcome that is perfectly consistent with the general rule. *In re Universal Display & Sign Co.*, 541 F.2d 142, 143-44 (3rd Cir. 1976). In a second, the court held that a defendant that was properly served with a complaint and default motion and did not contest the court's personal jurisdiction waived his rights by not appealing from the default judgment or seeking vacatur within a reasonable time after service. *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 903-06 (6th Cir. 2006) ("Significantly, appellant has never argued . . . that he lacked sufficient minimum contacts with Ohio when [plaintiff] filed the complaint or when the district court ordered the entry of judgment. Indeed, appellant could not successfully make that argument").

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[2] *See Homer v. Jones-Bey*, 415 F.3d 748, 750 (7th Cir. 2005); *Jackson*, 302 F.3d at 519; *Printed Media Servs. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993); *Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14 (3rd Cir. 1985); *Thos P. Gonzalez Corp.*, 614 F.2d at 1250; *cf. Sea-Land Serv., Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849 (1st Cir. 1998) (affirming denial of Rule 60(b)(4) motion where service was proper and there was no issue of minimum contacts).

Petitioners misread *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115 (2d Cir. 2008) as calling into question the "disparate treatment" of judgments, depending on whether they involved personal or subject matter jurisdiction. Pet. 14-15, 24. But *DiSapio* addressed no such thing. It held squarely that Rule 60(b)(4) may be "properly invoked to challenge lack of personal jurisdiction" where, as here, a non-appearing party with notice of an action against it suffers a default judgment. *DiSapio*, 540 F.3d at 123. It did not involve, and expressed no opinion on, the treatment under Rule 60(b)(4) of judgments rendered without subject matter jurisdiction. Nor does *DiSapio* provide any support for Petitioners' suggestion that relief under Rule 60(b)(4) should be available only if it is "inconvenient" for a defendant to appear in the judgment-rendering court, a theory that has no basis in the language of the Rule itself. Pet. 17. While *DiSapio* suggested that convenience, among other reasons, might explain the seeming anomaly of deeming an appearing party to have waived lack of personal jurisdiction by not properly asserting it in a timely motion while allowing a non-appearing party with notice to seek relief under Rule 60(b)(4), the court held that the availability of vacatur turned solely on the fundamental issue of whether the district court had personal jurisdiction over the defendant. *See DiSapio*, 540 F.3d at 124-26.

C. Rule 60(b)(4) Makes No Exception For A Defendant With Prior Notice Of The District Court Proceedings.

Petitioners also assert that the decision below is somehow inconsistent with this Court's recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) and earlier cases. Pet. 9-11, 19, 24. However, there is no such inconsistency, much less any basis for review by this Court.

Nothing in *Espinosa* remotely supports Petitioners' position that a party's notice of an action against it, in and of itself, necessarily waives the right to raise a jurisdictional defense under Rule 60(b)(4). There, the objecting creditor, which had filed a Rule 60(b)(4) motion seeking to set aside a bankruptcy court's order confirming the debtor's plan some ten years after it received actual notice of the plan and the confirmation order, "concede[d] that the Bankruptcy Court had jurisdiction to enter the order." 130 S. Ct. at 1378. For that reason, the Court had no occasion "to define the precise circumstances in which a jurisdictional error will render a judgment void." *Id.* at 1377. The Court held only that because the petitioner voluntarily submitted itself to the bankruptcy court's jurisdiction by filing a proof of claim, and failed to object to the proposed plan (or to appeal from the confirmation order) despite actual notice, it forfeited any objections regarding the validity of service, which was a procedural issue rather than a jurisdictional one. *Id.* at 1378, 1380. Likewise, none of the other cases cited by Petitioners involved a defendant who lacked minimum contacts with the forum.

See Sanderford v. Prudential Ins. Co., 902 F.2d 897, 899-900 (11th Cir. 1990); *Wells v. Rockefeller*, 728 F.2d 209 (3rd Cir. 1984).

Even more broadly, Petitioners' position that notice alone necessarily waives the right to raise a jurisdictional defense is squarely at odds with long-settled case law, which establishes that notice, minimum contacts, and compliance with a state's long-arm statute are separate and independent requirements for personal jurisdiction. *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 105 (1987) (personal jurisdiction requires more than just notice, but also minimum contacts and authorization for service); *Shaffer v. Heitner*, 433 U.S. 186, 198 (1977) (explaining that notice and power are separate aspects of jurisdiction); *accord, e.g., SEC v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007); *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 925 n.15 (11th Cir. 2003). The theory that a jurisdictional defense may be raised under Rule 60(b)(4) only by a defendant who was unaware of the case pending against it is one that has been roundly rejected by the courts. *E.g., Practical Concepts*, 811 F.2d at 1547 (rejecting argument that vacatur should be denied because the defendant had "passed up 'numerous opportunities'" to challenge the district court's jurisdiction); *see also* cases cited at pp. 10-11, *supra*.

Finally, Petitioners argue that KGL's decision to refrain from appearing in the action against it "circumvents the policy of finality implicitly recognized by the Court's ruling in *Espinosa*." Pet. 19. Petitioners' invocation of the "policy of finality," however, is foreclosed by this Court's decision in *Gonzalez v. Crosby*,

545 U.S. 524 (2005). There, responding to a similar argument, the Court stated, "we give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Id.* at 529. Petitioners' argument, if accepted, would render an initial jurisdictional finding final and unreviewable even if, as in the instant case, it was based on a one-sided and flawed presentation of evidence and is therefore concededly "erroneous." Pet. 11. Such an extreme result cannot be reconciled with the elementary principle that "a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Espinosa*, 130 S. Ct. at 1377.

II.

A PARTY LACKING MINIMUM CONTACTS WITH THE FORUM NEED NOT RAISE A JURISDICTIONAL OBJECTION UNDER RULE 12.

Petitioners briefly make the closely related argument that KGL was required to assert its jurisdictional defense under Rule 12(h)(1), and that by failing to do so, it waived its right to raise the issue any time thereafter. Pet. at 25-26. Thus, in Petitioners' view, Rule 60(b)(4) and Rule 12(h)(1) are in conflict with each other. That contention lacks any colorable basis, and certainly does not warrant review by this Court.

The notion that a party waives any right it may have to object to personal jurisdiction by failing to appear is

"against all federal authority." *Jackson*, 302 F.3d at 523. As the Fifth Circuit explained in rejecting a similar argument,

> True, a party's right to object to personal jurisdiction certainly is waived under Rule 12(h) if such party fails to assert that objection in his first pleading or general appearance. But a party's right to contest personal jurisdiction is not waived by his failure to appear at all. It is well-established that defendants need not appear in a federal court without authority to exercise personal jurisdiction over them to raise a jurisdictional defect.

Id. at 523 (internal quotations and brackets omitted); *see also Foster*, 278 F.3d at 414 ("Rule 12(h) contemplates an implied waiver of a personal jurisdiction defense by defendants who appear before a court," not by defendants who decline to appear and later move under Rule 60(b)(4)). Petitioners' theory would, in effect, render Rule 60(b)(4) a dead letter in any case in which a defendant with notice of the proceedings does not voluntarily appear to raise the jurisdictional defense.

Finally, *Insurance Corp. of Ireland* provides no support for Petitioners' argument that minimum contacts are not a prerequisite for personal jurisdiction where a party declines to appear and assert a defense under Rule 12. Pet. at 13, 16, 26-27. As Petitioners concede, the reason that the defendants in *Insurance Corp. of Ireland* were subject to personal jurisdiction is that—unlike here—they voluntarily appeared before

the court to contest jurisdiction. In so doing, they necessarily agreed to abide by that court's determination on that issue. *Id.* at 706. The defendants' violation of a discovery order furnished grounds for the district court to issue a sanction resolving the issue against them. *Id.* at 699. The court of appeals' decision below is entirely consistent with that holding, and presents no basis for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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